

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

---

No. 87

THE UNITED STATES OF AMERICA, PETITIONER

EDWARD A. RUMELY

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 28, 1952  
CERTIORARI GRANTED OCTOBER 12, 1952

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 11,666  
\_\_\_\_\_

EDWARD A. RUMELY

*Appellant,*

UNITED STATES OF AMERICA

*Appellee.*

\_\_\_\_\_  
Appeal from the United States District Court  
for the District of Columbia  
\_\_\_\_\_

**JOINT APPENDIX**  
\_\_\_\_\_

405

Filed in Open Court Nov 27 1950

Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term  
(Grand Jury Impaneled on October 3,  
1950, and Sworn in on October 4, 1950)

UNITED STATES OF AMERICA

v.

EDWARD A. RUMELY

Criminal No. 1789-'50

Grand Jury Original  
(2 U. S. C. 192)

The Grand Jury charges:

On June 6, 1950, in the District of Columbia, the Select Committee on Lobbying Activities of the United States House of Representatives was conducting hearings, pursuant to H. R. 298, 81st Congress, 1st Session.

Defendant Edward A. Rumely, by subpoena served upon him on May 26, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (1) the name and address of each person from whom a total of \$1,000 or more has been received by the Committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (a) receipts from the sale of



books, pamphlets, and other literature, (b) contributions, (c) loans; (2) as to each such person the amount, date, and purpose of each payment which formed a part of the total of \$1,000 or more. Defendant Rumely appeared before the said Committee on June 6, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default.

*Count Six*

On August 25, 1950, in the District of Columbia, the Select Committee on Lobbying Activities of the United States House of Representatives was conducting hearings, pursuant to H. R. 298, 81st Congress, 1st Session.

Defendant Edward A. Rumely, by subpoena served upon him on August 21, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (a) the name and address of each person from whom a total of \$500 or more has been received by the said Committee during the period from January 1, 1947, to August 1, 1950, for any purpose, and (b) as to each such person, the amount, date, and purpose of each payment which formed a part of the total of \$500 or more, and all correspondence relating to each such payment. Defendant Rumely appeared before the said Committee on August 25, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default.

*Count Seven*

On August 25, 1950, in the District of Columbia, the Select Committee on Lobbying Activities of the United States House of Representatives was conducting hearings, pursuant to H. R. 298, 81st Congress, 1st Session.

Defendant Edward A. Rumely appeared as a witness before the said Committee at the place and on the date above stated and refused to answer a question put to him by the Committee, namely, who was the woman from Toledo who gave him \$2000 for distribution of "The Road Ahead," which question was a question pertinent to the question under inquiry.

/s/ George Morris Fay  
United States Attorney  
in and for the District of  
Columbia

A True Bill:

/s/ Lloyd B. Wilson Jr.  
Foreman

409 Filed Dec 1 1950 Harry M. Hull, Clerk

*Plea of Defendant*

On this 1st day of December, 1950, the defendant Edward A. Rumely, appearing in proper person and by his attorney Neil Burkinshaw, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is granted leave within Thirty (30) Days to withdraw said plea and plead as he may be advised.

412 Filed Apr 18 1951 Harry M. Hull, Clerk

On this 18th day of April, 1951, came again the parties aforesaid, in the manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the alternate jurors are excused from further service in this case; thereupon the said jury, upon their oath do say that they find the defendant Guilty on Counts One, Six and Seven.

The case is referred to the Probation Office, and the defendant is permitted to remain on Bond pending sentence.

413 Filed May 2 1951 Harry M. Hull, Clerk

*Defendant's Prayer No. 1*

If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful, United States v. Murdock, 290 U. S. 389, 78 L. Ed. 381.

414 Filed May 2 1951 Harry M. Hull, Clerk

*Defendant's Prayer No. 2*

The word "wilful" often denotes an act which is intentional or knowing or voluntary as distinguished from accidental, but when used in a criminal statute it generally means an act done with a bad purpose . . .



415 Filed May 2 1951 Harry M. Hull, Clerk

*Defendant's Instruction No. 3*

If you find from the evidence, that it was physically impossible for the defendant to produce the records referred to in any count of the indictment, then your verdict shall be not guilty as to such count or counts of the indictment.

\* \* \*

416 Filed May 2 1951 Harry M. Hull, Clerk

*Defendant's Instruction No. 4*

The offenses charged in this indictment consist of an omission to act plus the intent to omit to perform an act required, but if you find from the evidence that it was physically impossible for the defendant to perform the act required, then your verdict shall be not guilty regardless of whatever you may find his intent to be.

\* \* \*

417 Filed May 4 1951 Harry M. Hull, Clerk

*Motion for a New Trial*

Comes now Dr. Edward A. Rumely, defendant in the above-entitled cause, by his attorneys, Neil Burkinshaw and Daniel B. Maher, and with leave of Court first sought and obtained, moves for a new trial, and as grounds therefor states:

1. The Court erred in not ordering a judgment of acquittal for the reason that the information sought both by subpoena and questions related to the identity of quantity purchasers of books published by the Committee for Constitutional Government, which demands were violative of the rights of the defendant under the guarantees of the

First Amendment to the Constitution relating to a free press.

2. The Court erred in not ordering a judgment of acquittal for that the subpoena and questions of the committee investigating lobbying activities were violative of the rights of the defendant in that they clearly showed that the investigating committee was encroaching on areas of privacy wherein under the Constitution of the United States not even the Congress is permitted to trespass.

3. The Court erred in not ordering a judgment of acquittal in that the Lobbying Act of 1946, under which the Congressional Committee was operating in search of information, is unconstitutional in that it does not define lobbying, hence, leaving the citizen with a lack of certainty as to what constitutes an offense under such law.

4. The Court erred in excluding character testimony with regard to the defendant's respect for constituted authority, a trait of character particularly in issue in view of the offense charged.

418 5. The Court erred in defining the word "wilfully" in such language as virtually to excise said word from the statute under which defendant was prosecuted.

6. The Court erred in its instructions to the jury in not according to the word "wilfully" the definition provided by the United States Supreme Court.

7. The Court erred in instructing the jury in not defining the word "wilfully" as used in a criminal statute as something done with an evil purpose.

8. The Court erred in instructing the jury that any reasons advanced by the defendant for not complying with the demands of the investigating committee, both by subpoena and by questions, were immaterial.

9. The Court erred in refusing to instruct the jury that they were entitled to weigh any considerations of good faith actuating the defendant to refuse compliance with the demands of the investigating committee.

10. The Court erred in restricting to defendant testimony of his character as to truth and veracity which was not in issue under the indictment.

11. The Court erred in not ordering a judgment of acquittal on the grounds that the documents subpoenaed and the questions asked were not pertinent to the Congressional resolution under which the investigating committee is operating.

12. The Court erred in refusing the defendant's instruction that if they found it was physically impossible for the defendant to produce the records sought by the subpoena that they should return a verdict of not guilty.

419 Filed May 11 1951 Harry M. Hull, Clerk

*Memorandum*

The Court has considered the defendant's motion for a new trial in the above entitled cause.

With the exception of Paragraphs 4 and 10, the matters therein set forth have been dealt with at substantial length either as preliminary matters or at the trial of the case, or both.

Paragraphs 4 and 10, while framed as different points, in fact relate to the same matter, namely, the Court's sustaining of the prosecution's objection to the following proffer of character testimony made by defense counsel.

"I am going to ask them the reputation he has for respect for constitutional authority, which is directly in issue in this case." (Transcript, p. 173.)

And again:



"I should like to make a proffer here on the questions to be asked Senator Hawkes as to the reputation of the defendant, as to his respect for constitutional authority, an issue which I submit is involved in this case." (Transcript p. 211.)

The Court is of the opinion that the question, in the form propounded, was not proper, inasmuch as the term "constitutional authority" is susceptible of widely varying interpretations. Indeed, this whole prosecution arose from the defendant's reliance on his determination of what is "constitutional authority."

The question was not phrased as stated in the motion for new trial, namely, "respect for constituted authority."

420 Paragraph 10 of the motion for new trial is also an incorrect statement. The Court did not limit the character testimony on behalf of the defendant to his truth and veracity. In discussing his proffer of testimony as to the defendant's respect for constitutional authority, defense counsel stated:

"Certainly I would be entitled to ask his reputation as to being a law-abiding citizen." (Transcript, p. 211)

But his proffer was limited to the defendant's reputation for respect for constitutional authority.

For the foregoing reasons the defendant's motion for new trial will be denied.

R. B. Keech,

Judge.

May 10, 1951.

421 Filed May 21 1951 Harry M. Hull, Clerk

Judgment and Probation

It Is Adjudged that the defendant has been convicted upon his plea of<sup>2</sup> not guilty and a verdict of guilty of the offense of Vio. 2-192 U. S. C. as charged<sup>3</sup> in Counts One, Six and Seven and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of<sup>4</sup> Six (6) Months and to pay a fine of One Thousand Dollars (\$1,000.00).

It Is Adjudged that<sup>5</sup> the execution of the said sentence be and the same is hereby suspended as to the terms of imprisonment only, and the defendant is placed on probation.

R. B. Keech,  
United States District Judge.

422 Filed May 18 1951 Harry M. Hull, Clerk

Notice of Appeal

Name and address of appellant: Dr. Edward A. Rume-ly, 2 East 86th Street, New York, New York.

Name and address of appellant's attorney: Neil Burk-inshaw and Daniel B. Maher; 930 Shoreham Building, Washington, D. C.

Offense: Violation Title 2, Section 192.

Concise statement of judgment or order, giving date, and any sentence:

Count I—Imprisonment for 6 months and fine of \$1,000.

Count VI: Imprisonment for 6 months and fine of \$

Count VII: Imprisonment for 6 months and fine of \$

Imprisonment under Counts I, VI, and VII to run concurrently and imprisonment suspended.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Dated: May 18, 1951.

/s/ Edward A. Rumely  
Edward A. Rumely, Appellant

427

## CRIMINAL DOCKET

Date

Proceedings

1950 Nov. 27 Presentment and Indictment filed  
(8 counts)

27 Bench Warrant Ordered & Issued. (D.  
A. Off.)

30 RECOGNIZANCE \$1500.00 taken with  
National Surety Corporation, New York,  
before Edward W. McDonald, U. S.  
Commissioner for the Southern District  
of New-York, filed.

Dec. 1 ARRAIGNED, Plea NOT GUILTY en-  
tered, 30 days, etc.



Attorney Neil Burkinshaw present, appearance entered, filed.

Appearance Daniel B. Maher entered, filed.  
CURRAN, J. Cert. filed.

15 Bench Warrant returned executed.

1951 Apr. 12 Appearance Alphons Landa entered, filed.  
JURORS SWORN on Voir Dire; JURY SWORN.

Henon Urband

Frances L. Chesser

Rufus G. Hoffman

George Lee

William C. Watts

Mildred F. Flood

Frances M. Williams

Leo G. Garner

Florian E. Bales

Morris Goldfarb

Otis K. Berry

Philip G. Gornbein

It appearing to the Court that the trial is likely to be a protracted one, the Court directs the calling of two additional persons to serve as Alternate Jurors.

Alternate Jurors Sworn: Jesse H. Connell, Catherine Baylor

Case respited until 1:30 P. M. tomorrow.

128 Apr. 12 Attorneys Neil Burkinshaw, Daniel B. Maher, Alfons Landa present. KEECH, J. Cert. filed.

17 House Resolution No. 194 and 191 and 192, filed.

TRIAL RESUMED, Same Jury;

Case respited until tomorrow

Attorneys Neil Burkinshaw, Daniel B. Maher, Alfons Landa present.

KEECH, J. Cert. filed.

18 TRIAL RESUMED, Same Jury;

Oral motion of the Government for leave to dismiss counts 2, 3, 4, 5, 8 granted.

Dismissal entered.

**VERDICT—GUILTY** on counts 1, 6; 7;  
Case referred to the Probation Officer  
of the Court;

Defendant permitted to remain on bond  
pending sentence;

Attorneys Neil Burkinshaw, Daniel B.  
Maher, Alfons Landa present.

KEECH, J. Cert. filed.

May 2 Government's prayers, filed.  
Defendant's prayers, filed.

4 Motion of defendant for a new trial is  
filed, argued and submitted.

Attorney Neil Burkinshaw present.

KEECH, J. Cert. filed.

11 Memorandum—motion of the defendant  
for a new trial is denied. KEECH, J.  
filed. (Copies to William Hitz and Neil  
Burkinshaw)

18 **SENTENCED** to Imprisonment for a  
period of Six (6) months and to pay a  
fine of One Thousand (\$1,000.00) Dol-  
lars; (J. I.)

Execution of sentence suspended; as to  
term of imprisonment only;

Defendant placed on probation in charge  
of the Probation Officer of the Court;

Recog. \$100.00 taken. Remain on bond  
pending payment of fine.

Attorney Neil Burkinshaw, Daniel Maher,  
Alfons Landa present. KEECH, J.

18 **NOTICE OF APPEAL**, filed. Clerk's  
Fee \$5.00 paid, and credited to the  
United States.

21 Judgment and probation of 5/18/51, filed.  
KEECH, J.

June 5 Designation of Record, filed.

Court Exhibit #1, Defendant's Exhibit #1, #2, #4, #5, #6, filed.

Transcript of Proceedings, Vol. 1, Pages 1-86; Vol. 2, Pages 87-259; Vol. 3, Pages 260-339; Vol. 4, Pages 340-404, filed.

6 Defendant's Exhibit #3, filed.

14 Government's Exhibits #1, 2, 3, 4, 5, 6, filed.

429 June 21 ORDER instructing the Clerk to include all exhibits herein in their present physical form in the record to be transmitted to the U. S. Court of Appeals for the District of Columbia Circuit, filed. KEECH, J.

44

*Dillard C. Rogers,*

*Direct Examination*

BY MR. HITZ:

Q Mr. Rogers/ give your full name, please. A Dillard C. Rogers.

Q And your occupation, sir? A I am with the Clerk of the House of Representatives.

Q Do you have any particular duties with reference to filing the forms that are required by the Federal Lobbying Act of 1946? A Yes, sir, I do.

Q What are your duties with respect to that? A To receive all lobbying papers sent in to the Clerk of the House and send receipt back for the same.

Q Do you have personal knowledge as to whether or

not in compliance with that Act the Committee for  
 45. Constitutional Government, Inc., filed any of the required forms after 1946; the date of the enactment of that legislation? A Yes, sir, I do.

Q Did that Committee for Constitutional Government, Inc., register, or did it not, under the Lobbying Act?

A Yes, sir, they did.

Q When did they first register? A The committee first registered in 1946, October 8, 1946.

Q Is that the year in which this lobbying legislation was enacted? A Yes, sir. That was the year when Public Law No. 601 for the 79th Congress was enacted under the Legislative Reorganization Act and under Title 3.

Q In compliance with that statute did organizations have to file quarterly reports? A Yes, sir, they did.

THE COURT: By organizations, Mr. Hitz, you mean registered organizations?

MR. HITZ: Yes, Your Honor.

BY MR. HITZ:

Q Has the Committee for Constitutional Government Inc., continued, after October, 1946, to file quarterly reports, in compliance with this Lobbying Act? A Yes, sir, they have on several quarters.

46 Q Have they omitted any quarters? A May I read the quarters there—

MR. BURKINSHAW: I object to that, if Your Honor please. The records speak for themselves. You mean omitted filing reports?

MR. HITZ: No; omitted filing any reports.

MR. BURKINSHAW: Oh, no question about that. Go ahead.

THE WITNESS: They filed on October 8, 1946—

BY MR. HITZ:

Q See if you can answer my question without reading it all. Have they filed regularly? A Well, apparently they have, sir. I do not have the exact—I have

everything here in the way where they registered but I don't know whether there are any misses or not, but apparently they have registered each quarter since the beginning of 1946 when the law was first enacted by Congress.

Q Is that true up to date? A Yes, sir—the last report that we received from the Committee for Constitutional Government from 205 East Forty Second Street, New York, was on January 12, 1951, but since then we have received a letter from them.

MR. HITZ: That is sufficient.

MR. BURKINSHAW: Just a moment. I object.

THE COURT: He stopped.

47 MR. BURKINSHAW: There is nothing in the indictment charging failure to register. I don't know what in the world Mr. Hitz is endeavoring to prove. It certainly doesn't relate to the indictment.

THE COURT: What is the purpose, Mr. Hitz?

MR. HITZ: I beg your pardon, sir?

THE COURT: What is the purpose?

MR. HITZ: I am proving pertinency to the inquiry of the committee to investigate lobbying activities.

THE COURT: All right.

BY MR. HITZ:

Q Mr. Rogers, has Mr. Edward A. Rumely registered under the Lobbying Act as an agent of that committee for Constitutional Government, Inc.? A Yes, he has.

Q And over what period has he registered as such an agent? A Mr. Rumely registered first in 1946 and he was employed by the Committee for Constitutional Government as an agent for them.

Q And over what period of time did he continue to do that? A Well, Mr. Rumely continued to register with us from April 25, 1950 through January 9, 1951.

Q Did he continue to register for 1946 to 1950?

48 A Well, he was registered there as a lobbyist from 1946 through 1950.



Q For what organization? A For the Committee for Constitutional Government from 205 East Forty-Second Street, New York City 17, New York.

MR. HITZ: No further questions, Your Honor.

*Cross Examination*

BY MR. BURKINSHAW:

Q Mr. Rogers, did you bring down with you your files with regard to the registration of the Committee for Constitutional Government? A No, sir. I did not bring down the files with me, only I have some notes I took from the cards.

Q Did you examine the complete file before coming down? A Sir?

Q Did you examine the complete file before coming down? A I looked over the files there.

Q Did you observe, in examining the files, that at the time of the original registration of the Committee for Constitutional Government, as well as the original registration of Dr. Edward A. Rumely, a protest was filed as against the requirement for each registering? A I didn't get the first part of the question.

49 Q Did you know that at the time of the original registration of the Committee for Constitutional Government and of Dr. Rumely, that each protested as a registration? A No. I did not go into the lobbying report itself.

Q So you haven't examined the entire file? A I haven't examined the lobbying report because we did not go into the lobbying report.

THE COURT: The answer is no, isn't it?

THE WITNESS: That is right.—no.

BY MR. BURKINSHAW:

Q Your answer is no, I take it? A Yes.

Q So you don't know whether or not protests were made? A No.

MR. HITZ: At this time I would like to offer Government's Exhibit 1, which is a certification that Ralph R. Roberts was named the House of Representatives Clerk on January 3, 1949, a very formal document in line with other documents to be offered.

50 MR. BURKINSHAW: No objection.

THE COURT: That will be received.

(Certification of Ralph R. Roberts as Clerk of House of Representatives marked and received in evidence as Government's Exhibit No. 1.)

MR. HITZ: Exhibit No. 2 for the Government is House Resolution No. 298 of the House of Representatives of August 12, 1949, which is the resolution creating the Buchanan committee and named its purpose.

MR. BURKINSHAW: Would you mind reading it at this time while it is being offered?

MR. HITZ: I don't want to read it unless it is in evidence.

MR. BURKINSHAW: All right; I will read it myself, then.

MR. HITZ: All right. Is it understood this is in evidence?

THE COURT: I understand there is no objection.

MR. BURKINSHAW: It is offered in evidence without objection on my part.

THE COURT: All right.

(Thereupon, House Resolution No. 298, dated August 12, 1949, was marked and received in evidence as Government's Exhibit No. 2.)

52 MR. HITZ: The Government next offers its Exhibit No. 3, which is a certified copy of an extract from the journal showing the designation of the members of the Buchanan committee.

MR. BURKINSHAW: No objection.

THE COURT: That is the personnel?

MR. HITZ: The personnel of the committee; the make-up of the committee.

THE COURT: If there is no objection, it may be received.

MR. BURKINSHAW: No objection.

(Certified copy of extract from Journal designating members of the Buchanan committee, was marked and received in evidence as Government's Exhibit No. 3.)

53 MR. HITZ: The Government next offers its Exhibit No. 4, which is the certification by the Speaker of the House of Representatives to the United States Attorney of the report of the House of Representatives citing for contempt the appearance and actions of Mr. Rumely on the occasions that we will be concerned with here. I will not read that part of that but offer it as a formal document to give jurisdiction to the trial of the case.

MR. BURKINSHAW: I have no objection. I  
54 should like to ask Mr. Hitz at this point if this report is signed, and if so, by whom.

MR. HITZ: The report isn't signed. It happens to be attached. I am offering the certification of Sam Rayburn only.

MR. BURKINSHAW: But the report itself is not signed?

MR. HITZ: No.

THE COURT: It is received if there is no objection. (Certification by Speaker of the House of Representatives, to the United States Attorney, of report citing Edward A. Rumely for contempt was marked and received in evidence as Government's Exhibit No. 4.)

55 MR. HITZ: I would like now to call Mr. Fitzgerald.

Thereupon.

*Benedict F. FitzGerald, Jr.*

*Direct Examination*

BY MR. HITZ:

Q Will you give your full name? A Benedict F. FitzGerald, Jr.

Q What is your address? A My address is 73 Pinckney Street, Boston, Massachusetts.

Q You are an attorney by profession, are you, sir? A That is correct.

Q Were you counsel of the so-called Buchanan Lobbying Committee of the House in 1950? A That is right.

Q Will you tell me when you went with the Committee as its counsel? A I went with the House as counsel in December of 1949.

Q And how long did you remain with them? A I remained there until about August of 1950.

Q Did you take any part in the service of a subpoena that was issued May 25, 1950, by the Buchanan Committee for the Committee for Constitutional Government? A I did.

Q Did you serve that subpoena upon anyone? A I did.

Q Whom did you serve that upon? A Upon the defendant Edward A. Rumely.

Q Who issued that subpoena? A The subpoena was issued by the committee, that is the Select Committee on Lobbying Activities.

MR. BERKINSHAW: Keep your voice up, please.

THE WITNESS: The Select Committee on Lobbying Activities through its chairman, Frank Buchanan, a Member of Congress from the State of Pennsylvania.

BY MR. HITZ:

Q Mr. Fitzgerald, did you serve that on Mr. Rumely in New York City? A I did.

THE COURT: Is there any question of service, gentlemen?

MR. BURKINSHAW: No; no question of service.

THE COURT: Can't we dispense with that?

MR. HITZ: I think we can.

THE COURT: All right.

BY MR. HITZ:

Q Mr. FitzGerald, will you please look at—by the way, do you have with you a copy of Part 4 of  
57 the hearings of the House Select Committee on Lobbying Activities? A I do.

MR. HITZ: I may say, Your Honor, that for the purposes of this trial it has been agreed between Mr. Burkinshaw and myself that the two volumes, Part 4 and Part 5 of the hearings, insofar as they relate to Mr. Rumely, are correct and we will not go to the reporter or to any shorthand notes for that purpose. Is that right?

MR. BURKINSHAW: That is right, absolutely.

BY MR. HITZ:

Q Would you turn to page 564, Part 4, and tell me if the subpoena you have just referred to, calling for Mr. Rumely's appearance before the committee on June 6, 1950, is reproduced there, at the bottom? A That is right.

THE COURT: Let me interrupt. Are there any extra copies of these?

MR. HITZ: I regret to say we have no other copy than the one I am reading from and the one the witness is reading from of Part 4, but we have one of the next volume.

THE COURT: If you have another extra copy it might be helpful for the reporter. You can get that back, of course.

MR. MAHER: We just have one set.



THE COURT: If you can indicate the pages you are reading from it will help the reporter.

58 MR. BURKINSHAW: This is at the bottom of page 564 of Part 4.

MR. HITZ: That is correct. At this time I would like to offer in evidence the subpoena as it is contained here.

MR. BURKINSHAW: No objection.

THE COURT: Shall we mark that so we will know what number it is?

MR. HITZ: We can call it Exhibit No. 5 for the Government.

THE COURT: And if there is no objection it will be received, and it is carried on page 564 of Part 4.

(The subpoena for Edward A. Rumely, just referred to, was marked and received in evidence as Government's Exhibit No. 5.)

59 BY MR. HITZ:

Q Mr. FitzGerald, will you be good enough to refer to the hearings contained in Part 4, with  
60 reference to June 6, 1950, and tell us whether or not Mr. Rumely did appear on June 6, 1950, here in the city of Washington?

I think you may find information on that subject on page 1 of the hearing, is that correct? A No. I think you will find it on page 17 of Part 4.

Q With reference to his appearance on that day would that be found on page 1 of the hearings? A That is right.

Q Did he appear on that day? A He did.

Q About what time?

MR. BURKINSHAW: 10:40 in the morning, according to the record.

THE WITNESS: That is right; 10:40 a. m.

BY MR. HITZ:

Q Who of the committee were present? A Representatives Buchanan; Lanham; Albert; Brown and O'Hara.

Q That is five of the seven-man committee, is that correct? A That is right.

Q And were you also present? A I was.

Q Mr. FitzGerald, I would like to ask you if  
61 this took place, and I am referring to page 17 of the hearings for June 6th, and inasmuch as there is no dispute with reference to the accuracy for the purposes of this case, of that record, I should like to offer so much of it in evidence as is contained on pages 17, 18, 19 and a third of the way down on page 20, and read it to the jury at this time.

MR. BURKINSHAW: No objection.

MR. HITZ: I may state for the benefit of the Court, and perhaps it would help the jury to know this, I am referring now particularly to Count No. 1 of the indictment. (Reading):

"The Chairman: Give your name and address, please.

"Mr. Rumely: Edward A. Rumely, R-u-m-e-l-y.

"The Chairman: What is your official connection with the Committee for Constitutional Government?

"Mr. Rumely: I am executive secretary.

"The Chairman: How long have you been with this committee, sir?

"Mr. Rumely: Since it was founded in 1937.

"The Chairman: Where are your official offices located?

"Mr. Rumely: 205 East Forty-second, New York City.

"The Chairman: Are you or your organization registered under the Lobbying Act?

"Mr. Rumely: We are, under protest.

62 "The Chairman: Under protest?

"Mr. Rumely: Yes.

"The Chairman: A subpoena was issued on the 25th

day of May 1950, by authority of the House of Representatives of the Congress of the United States of America commanding Benedict F. FitzGerald, Jr., to summon you to be and appear before the Select Committee on Lobbying Activities of the House of Representatives of which I, Representative Frank Buchanan, am chairman, and to bring with you such of the records of the Committee for Constitutional Government as indicate:

“(a) The name and address of each person from whom a total of \$1,000 or more has been received by the Committee for Constitutional Government during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (A) receipts from the sale of books, pamphlets, and other literature; (B) contributions; (c) loans;

“(b) As to each such person the amount, date, and purpose of each payment which formed a part of the total of \$1,000 or more. ◊

“I have before me a copy of the subpoena. Do you have your subpoena with you?

“Mr. Rumely: I do; right here.

“The chairman: Will you examine the subpoena  
63 to determine whether or not it is an exact copy?

“Mr. Rumely: This is a photostat of the subpoena that was issued.

“The Chairman: You have the photostat of the original?

“Mr. Rumely: I have the photostat of the original.

“The Chairman: Yes.

“Mr. Rumely: Yes; that is a duplicate.

“The Chairman: The copy is the same?

“Mr. Rumely: It is a copy of the same subpoena.

“The Chairman: And you are here in response to the subpoena?

“Mr. Rumely: I am here in response to the subpoena.

“The Chairman: And you are ready to produce these records before the committee, as stated in the subpoena?

"Mr. Rumely: I am going to produce a part of the records and withhold a part."

"The Chairman: Of course, this subpoena was served upon you by Benedict F. Fitzgerald, on the 27th of May, which I believe was on a Saturday; at what hour, do you recall?"

"Mr. Rumely: 4:45. I agreed to accept it at that time. Friday—I think it was Friday."

"The Chairman: Friday, at 4:45?"

"Mr. Rumely: Yes, sir."

64 "The Chairman: You are now before the Select Committee on Lobbying Activities at the time and place stated in the subpoena; is that not a fact?"

"Mr. Rumely: Yes."

"The Chairman: Did you bring with you the records of the Committee for Constitutional Government?"

"Mr. Rumely: I brought a portion of the records that we will supply the committee. There are certain areas that you ask information on, which I believe are outside of your power. I would like to make a statement, while I am under oath and subject to cross-examination."

"The Chairman: Just a minute, sir. What did you not bring?"

"Mr. Rumely: The names—"

"The Chairman: As to points (a) and (b)?"

"Mr. Rumely: I brought all on point (a)."

"The Chairman: That is the receipts from the sale of books?"

"Mr. Rumely: No, sir; not receipts from the sale of books. If you will allow me to make the statement—"

"The Chairman: I would like to ask you as to what you did bring, first."

"In other words, you have brought everything under section (a)?"

65 "Mr. Rumely: No. One moment. Section (a)—"

"The Chairman: The names and addresses?"

"Mr. Rumely: No; not receipts from the sale of books, or the identity of purchasers of books. I don't mind giving the total income, but not the identity of the purchasers of books and literature.

"Mr. Lanham: Do you have the records called for by the subpoena in your custody and/or in your office?

"Mr. Rumely: Yes.

"Mr. Lanham: Do you refuse now to comply with the orders of the committee directing you to produce these books and records—do you have them with you?

"Mr. Rumely: I have information on the people who contributed—

"Mr. Lanham: We didn't ask you for information. We asked you for books and records.

"Mr. Rumely: We have transcripts.

"Mr. Lanham: Do you have the books and records with you this morning in court—before the committee?

"Mr. Rumely: I haven't them here. My auditor brought some.

"Mr. Lanham: Do you have them here and are you ready to produce them for the committee?

"Mr. Rumely: No; I do not have the books of account. We have the transcripts of them.

66 "Mr. Lanham: I asked you whether you had the documents called for in the subpoena, here before the committee this morning?

"Mr. Rumely: I have a portion of the documents called for.

"Mr. Lanham: You do not have all of the documents.

"Mr. Rumely: I do not have all of the documents.

"Mr. Lanham: That is all.

"The Chairman: That is all. You may step down."

MR. BURKINSHAW: Might I make a suggestion, that when we use the names Mr. Brown, Mr. Lanham, Mr. O'Hara, and so on, that these are members of the investigating committee.



MR. HITZ: Yes, that is correct. Thank you; I will be very glad to bring that out.

BY MR. HITZ:

Q Mr. Lanham was one of the members. Mr. Brown who is now asking the question, was another member, is that correct? A That is correct.

Q He was from Ohio? A That is Clarence J. Brown from Ohio, a Member of Congress.

MR. HITZ (reading):

“Mr. Brown. Just a minute. I am wondering if the gentleman will not be permitted to, at least, explain what he does have here, and what he doesn't have, and what he will furnish, and what he doesn't feel he should furnish under this subpoena. And then I have two or three questions I would like to ask him. Dr. Rumely's face is quite familiar to me. I think he has appeared before other committees I have been on.

“The Chairman. Mr. Albert, do you have questions?”

BY MR. HITZ:

Q Mr. Albert was a committee member, was he not?

A That is right. That is Carl Albert of Oklahoma.

MR. HITZ (reading):

“The Chairman: Mr. O'Hara?

“Mr. O'Hara. I join with my colleague, Mr. Brown, and insist that the witness should be permitted to give that information.”

BY MR. HITZ:

Q He was another member? A That is right, Joseph P. O'Hara, of Minnesota.

MR. HITZ (reading):

“The Chairman. You may proceed, Dr. Rumely, and make a statement in answer to the question of Mr. Brown.

“Mr. Brown. I would like for him to make a statement as to why he feels the way he does. If the committee is in error, we should know it. We have a right

to have his views, what he is going to furnish  
68 and what he feels he shouldn't furnish.

"Mr. Rumely. May I have the opportunity of making a statement, while I am under oath, and subject to cross-examination?

"The Chairman. Mr. Brown asked a question, as to what you brought with you.

"Mr. Brown. And I asked for a statement explaining what he brought and what he didn't bring.

"Mr. Lanham. I object to his reading any statement until he has produced the records that the committee has asked for. He is in contempt of the committee until he does produce those records, and I object to his reading any statement until he has accounted for the production of those records.

"Mr. Brown. I am readily amazed and ashamed that this committee will not permit any citizen to say he is furnishing certain material requested and why he cannot, or feels he should not, furnish other material.

"Mr. Lanham. I do not object to his stating what he is supplying. I want him to state that, but object to his making a long statement.

"Mr. Brown. I think we should be proud of our great democracy, of our great Republic, and of the way this committee has been conducted this morning.

69 "Mr. Lanham. He just wants to use the committee as a sounding-board.

"Mr. Brown. I am afraid the committee has been used as a sound-board.

"The Chairman. May we have order, please.

"Mr. Lanham. As long as he is in contempt of the committee—

"Mr. Brown. I don't know that he is in contempt.

"Mr. Lanham (continuing): I object to his reading any statement.

"Mr. Brown. I don't know whether he is in contempt of the committee.

"The Chairman. Mr. Brown asked you a question, Dr. Rumely. I would like to have you give an answer to the question. Will you state it again?"

"Mr. Brown. Yes. I would like to know what records you are willing to produce, and what records you feel you should not produce, and the reason therefor?"

"Mr. Rumely. I am willing to produce the records of all contributions of \$1,000 or more within the period designated; I am willing to produce the records of all loans within the period designated, except a few that related to the promotion of The Road Ahead, and advertising Fighters for Freedom, which has nothing to do with lobbying. I am not going to produce the names of people who bought books because, under the Bill of Rights, that is beyond the power of your committee to investigate."

70

BY MR. HITZ:

Q Mr. FitzGerald, by way of documents or any other way, on June 6, 1950, did Mr. Rumely provide the committee or you, or this counsel, with the names of the persons who in the total value of \$1,000 or more purchased books, pamphlets and other literature from his organization, the Committee for Constitutional Government, Inc.? A He did not.

Q Has he ever done it since June 6? A He has not.

Q I would like to direct your attention to the testimony of June 28, some 22 days after we have been referring to, as it is contained on page 126 of Part 5.

Referring now to page 126, that refers to 22 days later, June 28. Did Mr. Doyle make this observation to Mr. Rumely—by the way, did Rumely appear again on the 28th of June, 1950? A He did.

Q In Washington? A Yes, sir.

Q Did Mr. Doyle say this and did Mr. Rumely make the reply thereto:

"Mr. Doyle. That is one of the purposes of the committee, Dr. Rumely, to get the honest facts, whatever they are."

71

"Mr. Rumely. I am perfectly willing to give everything except one thing. I haven't withheld anything, except the names of the buyers of our books. Those you can't have."

Did that happen 22 days after June 6th?

A That did happen.

Q Mr. FitzGerald, do you have any knowledge of a subpoena issued by the Buchanan Committee on August 21, 1950, for the appearance of Mr. Rumely in his capacity as an officer of the Committee for Constitutional Government, Inc., calling for him to appearing before the Buchanan Committee on August 25, 1950? A With slight correction in the date, yes. The date was August 20th rather than August 21st.

Q It was issued on the 20th? A The date the subpoena was issued, I believe. I think that is set forth on page 175 of Part 5 of the hearings, in the middle of the page thereof.

THE COURT: Do I understand, gentlemen, all this transpired in the District of Columbia? There is no question about that.

BY MR. HITZ:

Q It did, didn't it, Mr. FitzGerald? A Yes, it did.

Q Mr. FitzGerald, I see a subpoena set forth here. You corrected me on the date. A August 21st.

Q Is it not August 21st it was issued? A That is right.

Q Did you have anything to do with the service of a subpoena described as I have described one a moment ago, upon Mr. Rumely? A Yes, I did. I witnessed the service of it by William Earl Griffin, the clerk of our committee.

Q Where was service made? A Service was made at the executive offices of the Committee for Constitutional Government at 205 East Forty-second Street, in New York.

Q Is that subpoena on page 175 of the hearings, Part 5? A That is right.

MR. HITZ: I understand, again, that Mr. Burkinshaw agrees that it is accurately reproduced here.

MR. BURKINSHAW: Yes.

MR. HITZ: In view of that understanding, Your Honor, I would like to offer the subpoena as reprinted on page 175, in evidence at this time, and read it to the jury.

THE COURT: No objection, Mr. Burkinshaw?

MR. BURKINSHAW: No objection.

THE COURT: It will be received.

MR. HITZ: That will be Government's Exhibit No. 6. (Subpoena dated August 21, 1950 to Edward A. Rumely was marked and received in evidence as Government's Exhibit No. 6.)

75 BY MR. HITZ:

Q Mr. FitzGerald, did Mr. Rumely appear before the committee in Washington on August 25, 1950? A He did, at 10:05 a. m.

Q Can you tell us where in the record that appears? A That would be located on page 173 of Part 5.

Q And who was present when Mr. Rumely so appeared? A Representatives Buchanan; Lanham; Albert; Doyle; Brown and O'Hara.

Q And you were there? A And I was there, too. MR. HITZ: At this time, Your Honor, I would like to offer in evidence almost a complete page of testimony of the hearings commencing on page 271, Mr. Burkinshaw, and to read to "Mr. Albert" on the next page. Any objection?

MR. BURKINSHAW: No; go ahead.

THE COURT: It will be received.

MR. HITZ: I may say that this relates to the two remaining counts in the indictment. Reading from page 271:



"Mr. FitzGerald. Now, in your previous testimony you made mention of the following individuals who had made large contributions to the Committee for Constitutional Government. You said J. Howard Pew of Pennsylvania had made some large contributions. How much did he make, or, how much did he—

"Mr. Rumely. I don't recall that testimony." I would like to interrupt to say the Government is not charging him with failure to answer with reference to Mr. Pew.

MR. BURKINSHAW: The Government is not what?

MR. HITZ: Any refusal to deliver documents or to testify with regard to Mr. Pew.

MR. BURKINSHAW: All right.

MR. HITZ: Now, resuming the record; (reading):

"Mr. FitzGerald. You say or you said that a woman from Toledo gave you \$2,000. Do you remember that in your previous testimony?

"Mr. Rumely. For the distribution of The Road Ahead.

"Mr. FitzGerald. Who was that woman?

"Mr. Rumely. We are not giving you the names of the people who bought our books.

"Mr. FitzGerald. Now, you refuse to give that information?

"Mr. Rumely. I refuse to give the names of people who bought our books. You are invading our constitutional right as publishers.

"Mr. FitzGerald. Even though you are registered as a Lobbyist, and you realize—

"Mr. Rumely. I am registered not for that activity, but because I send to Congress releases and other material, and, as we have a publishing enterprise, two-thirds of our activities, or more, is the sale of books and literature, and we are not going to—

"Mr. Fitzgerald. You refuse, even in the light of the fact that we have subpoenaed you here this morning, and

we have a quorum present at the present time, and we might find you in contempt should you fail to comply with the questions that are proper and are pertinent to this occasion?

"Mr. Rumely. They are not proper and pertinent; when a subordinate law of Congress conflicts with the organic law in the Constitution the subordinate law has to give way, and the organic law prevails, and you are trying to bust up the Bill of Rights and you are going to set the precedents of doing it."

Now, skipping to the bottom of page 272, and reading from six lines above, I would like to offer from there to the end of the page, in evidence. Is there any objection?

MR. BURKINSHAW: No, no objection.

MR. HITZ: Before I read that I would like to ask this question:

BY MR. HITZ:

78 Q Referring now to the bottom of page 272, in between what I have just read and what I am about to read, was there some discussion about State organizations and such like? A There was.

MR. HITZ: And I will pick up there:

"Mr. Rumely. We have not been furnished contributions; they have bought books, and —"

MR. HITZ: I would like to interrupt myself to say we are not charging any failure with respect to medical associations, Your Honor.

Continuing the reading:

"Mr. FitzGerald. How many medical associations have bought books?"

"Mr. Rumely. Probably a dozen."

"Mr. FitzGerald. What are the names of those?"

"Mr. Rumely. I will not give the names of purchasers of books, I have told you that repeatedly."

MR. HITZ: And then I think the final reference I will make to the hearings is on the final page 273. Any objector

MR. BURKINSHAW: No, go ahead.

MR. HITZ: Page 273 of Part 5:

“Mr. FitzGerald. Dr. Rumely, I want to be perfectly fair with you, to give you this opportunity to answer these questions. Remember that this committee has contempt powers and they might be exercised should you fail.”

“In view of that, would you change your mind and give us this information?”

“Mr. Rumely. I cannot where a constitutional question is involved. If we set the precedent of yielding against our conviction and against the advice of our lawyers that the first and fourth amendments cover our book operations, why then, we, instead of upholding constitutional government are setting a precedent to break it down, and we are not going to do it. It is a hot spot; I do not want to be in the spot.”

“The Chairman. It is indicated to counsel that the answer of the witness is in negation of the question, and counsel will continue.”

“Mr. Rumely. I stated again—

“The Chairman. We do not need to go any further.”

THE COURT: I understand there is no objection to that?

MR. BURKINSHAW: No objection.

BY MR. HITZ:

Q Mr. FitzGerald, with reference to the second subpoena that we have referred to here, and the appearance under the subpoena of Mr. Rumely on August 25, 1950, did Mr. Rumely provide, as required and requested in the subpoena, the names of purchasers of books, pamphlets and so on, and the names of persons making contributions? A He did not.

Q Has he ever since then done that to the Buchanan Committee, to your knowledge? A No, he has not.

Q Has he ever stated, on August 25 or since then, that he would produce such material? A No, he has not.

MR. HITZ: We have no further examination of the

witness, and nothing further to read from the hearings at this time. We submit him for cross examination.

THE COURT: There is one question I would like to ask Mr. Burkinshaw. Is there any question as to who the person is in this matter? This is one and the same person?

MR. MAHER: I assume you refer to the identity of Dr. Rumely?

THE COURT: Yes, sir.

MR. BURKINSHAW: Oh, no; no question about that.

*Cross Examination*

BY MR. BURKINSHAW:

Q Mr. FitzGerald, you served this first subpoena, the one serving as a basis of Count 1, you served that on May 26, 1950, is that correct? A That is right.

Q At that time you were one of co-counsel for the Buchanan Committee? A That is right.

Q You are familiar with its books, records and papers? A Of the committee?

Q Yes. A The congressional committee?

Q Yes. A Yes.

Q Did the Buchanan Committee keep a journal or minute book of its sessions and its operations? A It kept several types of books, yes.

Q You are familiar with those books? A Not all of them.

Q In particular do you know whether or not the Buchanan Committee ever authorized, as a committee, the issuance of this May 26 subpoena on Dr. Rumely?

MR. HITZ: I object as immaterial.

MR. BURKINSHAW: If the Court please, it is one of the most material things in this case. I am prepared to argue it now.

THE COURT: Gentlemen, please come to the bench.

82 MR. BURKINSHAW: One of the essential allegations in Count 1 is the fact that a subpoena issued pursuant to authority and was served on Dr. Rumely.

I propose to prove by this witness himself, if permitted to answer, that that subpoena was issued on the sole authority of Frank Buchanan, chairman of the committee, and without any authority, knowledge or acquiescence on the part of the Buchanan Committee as a committee.

I am prepared to show by Representatives Halleck, Brown and O'Hara, whom I intend to produce here tomorrow morning, that the meeting for the purpose of authorizing this subpoena never was held.

I propose to show, and I think Your Honor will take judicial notice of the proceedings of the Congress, that the subject of the invalidity of this subpoena repeatedly was discussed on the floor of the House.

In particular, on June 21, 1950 Mr. Brown, a member of that subcommittee, said that he was so concerned with respect to the invalidity that he consulted the Parliamentarian of the House, who told him that the issuance of that subpoena, without authority of the committee, constituted an invalid subpoena.

If this man is charged under a subpoena, failing to respond to a subpoena, and I can establish that that subpoena never was authorized, that it was something done precisely on his own hook by Representative Buchanan and not by the committee, it runs to the heart of that first count.

THE COURT: You contend that Buchanan had the right in his individual capacity?

MR. HITZ: As chairman.

THE COURT: And under what authority?

MR. HITZ: The authority of the resolution.



MR. BURKINSHAW: That was discussed on the floor of the House. He has administrative authority to issue that after the committee has authorized it.

MR. LANDA: The subpoenas were issued in blank in some instances and signed, and then they filled them out, without ever submitting them to the committee.

MR. BURKINSHAW: Of course they were.

THE COURT: Is it your contention, Mr. Burkinshaw, that you have to have a majority of the committee in order to issue that subpoena?

MR. BURKINSHAW: Yes.

THE COURT: What is the authority for that?

MR. BURKINSHAW: The debates on the floor of the House ran all through the month of June, boil down to this—

THE COURT: No, what validity would I get from the debates? They debate everything, the war in Europe, and everything.

MR. BURKINSHAW: No, I am not talking  
84 about the debates as far as you are concerned, but in the debates they refer to the appropriate rules of the House—I have reference to them here.

THE COURT: I would like to see the rule.

MR. BURKINSHAW: The rule for the standing committees, if the Court please, provide that the committee may authorize.

In other words, your standing committees, your Appropriations Committee, Foreign Relations Committee, and so forth, all these committees in order to issue a valid subpoena must have the subpoena authorized by the committee itself.

Now, in this case the fact of the matter is, and I will show that these agents were running around the country with blank subpoenas signed by Buchanan, and their agents were filling in the subpoenas as they saw fit.

THE COURT: We have subpoenas of this Court to go out in that manner, too, don't we?

MR. BURKINSHAW: But an officer of the Court fills it out.

THE COURT: This man was chairman of the committee.

MR. BURKINSHAW: He was chairman of the committee, but I intend to produce three members of that committee tomorrow morning who will testify that there never was a committee meeting authorizing that.

THE COURT: Never was a committee meeting during what?

85 MR. BURKINSHAW: There was never a committee meeting for the purpose of authorizing this.

THE COURT: In this particular case?

MR. BURKINSHAW: This particular subpoena. This subpoena was issued by Frank Buchanan on his own.

THE COURT: Assume that to be true, that he did issue it; what makes this improper as the resolution reads?

MR. BURKINSHAW: This, that that resolution, and as I said—

89 THE COURT: Come to the bench, gentlemen. (Thereupon counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

THE COURT: I am going to hold that the subpoena was validly issued in this case, and that they were duly before the committee, and that brings me to the question of pertinency. I feel that the evidence with reference to pertinency should be heard by the Court. So unless you have something at this time in addition to that, I guess we should excuse the jury. Mr. Hitz, for that purpose.

MR. HITZ: There is one item I would like to bring out before the jury and then we are ready to proceed with the pertinency testimony.

THE COURT: All right. The Clerk has brought in to me these documents (indicating); I don't know what they are.

MR. BURKINSHAW: I don't know what they are.

THE COURT: Let's look at them and see what they do say.

MR. MAHER: That is the resolution authorizing the appearance here of Albert, Lanham and Doyle.

THE COURT: What do you want me to do with it, file it with the Clerk?

MR. BURKINSHAW: Yes.

THE COURT: And the other relates to Brown, Halleck and O'Harra.

90 MR. BURKINSHAW: All right.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had, in open court.)

THE COURT: Are you ready, Mr. Hitz?

MR. HITZ: Yes. Mr. FitzGerald, will you resume the stand?

Thereupon—

*Benedict F. FitzGerald, Jr.*

• • • •

*Direct Examination*

BY MR. HITZ:

Q Mr. FitzGerald, I thought I had asked this question at our last meeting, but I checked the record and I don't believe I did.

Did the two subpoenas to Mr. Rumely in this case, one of which I think you said you served and the other you witnessed the service of, have the signature of Mr. Buchanan on each? A They did.

MR. HITZ: No further questions, Your Honor.

MR. BURKINSHAW: No questions.

MR. HITZ: Thank you, Mr. FitzGerald.

(The witness left the stand.)

MR. HITZ: Your Honor, I think we have reached  
91 that point in the case now that we have mentioned  
before.

MR. BURKINSHAW: May I inquire if at this time  
the Government has rested?

THE COURT: I didn't understand so.

MR. HITZ: No, not yet.

THE COURT: I understood he was going to take up  
testimony with reference to pertinency.

MR. HITZ: That is right. With respect to Count 1,  
the Government has presented evidence to the effect that  
the matters sought in the subpoena, and refused, and I  
think we are dealing only with respect to the refusal  
there of the list of contributors to the organization of  
\$1,000 or more, and that would be covered in certain  
parts of that body of information by each one of the  
items mentioned in the subpoena; that is parts (a) and  
92 (b) of Part 1 and Part 2, the amounts, date and  
purchase of each.

We think the evidence as to the pertinency as  
to the resolution, and therefore as to the inquiry of this  
committee, is fully covered when we have proved, as we  
have here, that there was registration by the organiza-  
tion of which Mr. Rumely was the executive secretary.  
We think in view of the fact that he was registered,  
and his organization was registered, even though, as he  
stated under protest, that it shows some, if not all of  
the activities of the Committee for Constitutional Gov-  
ernment, came within the purview of an inquiry by this  
committee. And of course the Government urges here  
and will throughout the case, that that proceeding and this  
proceeding is not one seeking to prosecute Mr. Rumely  
or the Committee for Constitutional Government for any  
failure or any improper registration with the Clerk of

the House of Representatives. Those matters could be handled in good faith and fully and completely by Mr. Rumely and his organization, and still they could be called before the Committee in order to have the Committee inquire with regard to possible future registration or as to whether or not the present Act was working properly.

So we say we have shown pertinency with respect to Count 1 in that way.

Exactly the same evidence supports the allegation of pertinency under Count 6, the next count.

Under Count 7, with regard to the volunteered statement by Mr. Rumley that some lady whom he met on the train, who was from Toledo, had given him \$2,000 for distribution of The Road Ahead, we say that is pertinent. We think it is pertinent on its face that someone who gave \$2,000 for the distribution of the book was a person whom the committee could inquire into as to who they are, having always in mind that the contributors to a lobbying organization are at all times subject to listing under the Act, and therefore we say of course the committee could inquire.

We do, however, wish to read into the record here, as further pertinency testimony under Count 7, a portion of the record, which is page 166 of Part 5 of the hearings, and the context on this subject of pertinency and of the subject matter of The Road Ahead is as follows, and I am quoting about seven lines from the bottom:

"Mr. Rumely. 'The Road Ahead', I have told you all along, we put out 600,000. I am not going to give you the names of the people who bought it.

"Mr. FitzGerald. Don't you feel 'The Road Ahead' deals with specific legislation?

Mr. Rumley. 'The Road Ahead' deals with stopping the march into socialism and the destruction of our form of government.



“Mr. FitzGerald. I think that the true significance of ‘The Road Ahead’ can be obtained only by reading it in its entirety, and I suggest that the committee read it. It condemns practically all of the social legislation which has been passed by the Roosevelt and Truman administrations and opposes practically all of the present legislative program of President Truman. However, it does deal with specific legislation from time to time.

“For example, it deals with the war powers: On page 158 it states:

“We must curb the grasping hand of the Federal Government. We must restrain the grasping hand of the Executive. And our very first step must be to make a list of the emergency powers granted to the Executive for war purposes and then repeal every one of them.

“It opposes compulsory health insurance, the Brannan Plan, government credit regulation, and direct government lending, as exemplified by the Farm Credit Administration, Housing and Home Finance Agency, Home Loan Bank, Federal Savings and Loan Institutions, F.H.A., Public Housing Administration, and Federal Deposit Insurance Corporation.

“The members of the committee were furnished with a memo on that book, and several others, when Dr. Rumely appeared.”

MR. BURKINSHAW: Read the next four questions so we will have the context, please.

MR. HITZ: All right. (Reading):

“The Chairman. Is this your opinion, Mr. Counsel?”

“Mr. FitzGerald. That is right.

“The Chairman. The Committee—

“Mr. O’Harra. I don’t think we are bound by that.”

MR. BURKINSHAW: That is enough for my purpose.

MR. HITZ: In addition to the pertinency which we believe is shown on the face of the question, "Who is the lady from Toledo who gave you \$2,000 for the distribution of 'The Road Ahead,' we offer that as further pertinency testimony. And that is all the testimony we offer at this time, because we feel that the pertinency of this committee's pertinency is amply shown.

THE COURT: I understand there is no objection to what has been read.

MR. BURKINSHAW: No. May I inquire at this time—

THE COURT: Did you say no?

MR. BURKINSHAW: I have no objection to him reading that, of course not. May I inquire, as a matter of just orderly procedure, whether the Government has rested, because I propose to address myself at length to the Court on a proposition of a motion for a directed verdict of acquittal.

THE COURT: You will be given that opportunity, but what I understood we were doing now was dealing with a matter of pertinency.

I understand Mr. Hitz has presented what he deems to be proper on the subject.

96 MR. BURKINSHAW: Would Your Honor want me to answer that?

THE COURT: Yes, if you have something to say.

MR. BURKINSHAW: Yes, Your Honor; I have a great deal to say.

THE COURT: Frankly, if you are going to address yourself to that particular thing, I can't imagine anything more pertinent in connection with lobbying than asking the names and dollars and cents contributed, because that is what makes the wheels spin, it seems to me.

MR. BURKINSHAW: Perhaps I will be able to enlighten Your Honor.

THE COURT: I throw it out to you so you can see what is passing through my mind.

MR. BURKINSHAW: If the Court please, in this very courtroom—

THE COURT: May I interrupt you again? Where do you propose to go from here? It may be what Mr. Burkinshaw is going to say can be said at one time collectively rather than doing it by piecemeal.

MR. HITZ: We have offered all of our pertinency testimony. In fact we have offered all of our testimony, and we are prepared to rest now, so Mr. Burkinshaw can proceed to attempt to combat our pertinency testimony.

THE COURT: We have the Government's case in, and you are now resting, and I understand everything that has been tendered by way of exhibits has  
97 been received without objection.

MR. BURKINSHAW: So we know where we are, and I can proceed to argument in support of a motion for judgment of acquittal, as it is termed now.

*Argument in Support of Motion for Judgment of Acquittal*

MR. BURKINSHAW: If the Court please, the United States Supreme Court in the Sinclair case, 279 U. S., 263, held that pertinency must be pleaded and pertinency must be proved. Our position here is that pertinency has not been adequately pleaded, and with respect to proof there has not been offered a scintilla of proof—only certain material on which Your Honor is asked to indulge in a surmise or a conjecture that these things sought to be elicited from Dr. Rumely were pertinent to a lobbying investigation.

What has the Government got here? The fact that a man registered, under protest, under the Lobbying Act, plus the statements introduced, and there is some rank opinion, as observed by Congressman O'Harra, on the part of Mr. FitzGerald, counsel for the committee,

that the book, *The Road Ahead*, has to do with pending legislation.

Now, under the subject of pertinency, the distinguished Justice Hitz, the father of our prosecutor here today, held more than 20 years ago, in this very courtroom, that pertinency must be pleaded and must be proved, and the question of pertinency was a question of law for the courts.

In that case government counsel—and by the way, I had quite a bit to do with it myself, if the Court please—urged upon the Supreme Court, when the case reached that stage, that the federal courts should indulge a presumption of regularity with respect to the operations of an investigating committee.

That suggestion and that contention on the part of government counsel was rejected by the United States Supreme Court, and the statement so stated in the opinion, that the presumption of innocence running to the defendant was stronger. It held that pertinency must be pleaded and must be proved.

The Court said that it was incumbent upon the United States to plead and show that the question was pertinent to some matter under investigation.

The Court further said, in another place, that the matter for determination was whether the facts called for by the question were so related to the subjects covered by the resolution that such facts reasonably could be said to be pertinent to the question under inquiry.

This is a criminal case. Neither the Court nor government counsel can urge that there are any presumptions running as against a defendant in a criminal case.

Pertinency in this case cannot be provided by surmise or by conjecture. It must be pleaded and it must be proved.

Now, if Your Honor will turn to Count 7, look at the pleadings, look at the way the question of pertinency was pleaded:

“Defendant Edward A. Rumely appeared as a witness before the said committee at the place and the date above stated and refused to answer a question put to him by the committee, namely, who was the woman from Toledo who gave him \$2,000 for distribution of ‘The Road Ahead,’ which question was a question pertinent to the question under inquiry.”

I have drawn many, many hundreds of indictments, if the Court please, but I never have encountered in any indictment either that I drew myself or under which I functioned as a government prosecutor, a material allegation with respect to a most important feature of a count pleaded in that sloppy fashion.

Compare the count in the Sinclair case, as prepared by then Owen J. Roberts, later Justice Roberts. I am reading from 279 U. S. at page 288 of the official print. The Supreme Court dealing with the indictment there states as follows:

“And the indictment charges that, on March 22, 1924, the matters referred to in these resolutions being under inquiry, and appellant having been summoned to give testimony and having been sworn as aforesaid did appear before the committee as a witness. The first count alleges that Senator Walsh, a member of the committee, propounded to him question which appellant knew was pertinent to the matters under inquiry: ‘Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that.’

“And, to explain that question, the indictment states: ‘Said Hon. Thomas J. Walsh, thereby meaning and intending, as said Harry F. Sinclair then and there well



knew and understood, to elicit from him the said Harry F. Sinclair, facts which then were within his knowledge, touching the execution and delivery of a certain contract bearing date September 25, 1922, made and executed by and between said Mammoth Oil Company, one F. G. Bonfils and one John Leo Stack, which was executed on behalf of said Mammoth Oil Company by said Harry F. Sinclair as president of said Mammoth Oil Company, and which, among other things, provided for the payment, by said Mammoth Oil Company, unto said F. G. Bonfils and said John Leo Stack, of the sum of \$250,000

on or before October 15, 1922, in consideration  
 101 of the release, by said F. G. Bonfils and said John Leo Stack, of rights to lands described in said Executive Order of April 30, 1915, and embraced in the aforesaid lease of April 7, 1922.' And that count concluded: "And that said Harry F. Sinclair then, and there unlawfully did refuse to answer said question."

Here we have a single word depending like a caudal appendage from the end of the count, simply a recital of the word "pertinent."

In the Sinclair case, and in all other contempt cases with which I have any familiarity, the question of pertinency was pleaded as it should have been pleaded.

THE COURT: Do you recognize any difference between the timing, and the new rules?

MR. BURKINSHAW: I understand about the new rules very, very well, if Your Honor please, but at the same time, the new rules, while responsible for many good things, have not totally relegated the science of accurate and good pleading to the discard. And I say when the Supreme Court says that a certain material element of an offense must be pleaded, it means what it says, and it should be pleaded, and not in the sloppy fashion in which it appears in this indictment in this particular case. I say it is not pleaded.

THE COURT: Really, what you are saying  
102 is that it is not well pleaded.

MR. BURKINSHAW: What I am saying is that there is not the allegation in the indictment to conform to the requirements set up by the United States Supreme Court with respect to a material allegation of this case. There is no showing, no language, nothing except the use of the word "pertinent" in there to carry out the mandate of the Supreme Court with respect to the requisites of proper pleading in a case of this sort.

Now we get down to the proof of pertinency. The position of Mr. Hitz is, as I understand it, that pertinency is proven because the defendant registered under protest under that Act. That is item 1.

The very fact that he registered under protest, as brought out as part of the Government's case, illustrates about as well as anything that in so doing the defendant at the time of his registration, in 1946, was setting up the claim that he did not consider himself to come within the terms of the Act. The matter of protest is a very significant factor in this case.

So to take the surmise registration under protest, Mr. Hitz takes the opinion of Benedict Fitzgerald, counsel for the Committee, and pins those together and says to Your Honor there is pertinency; pertinency has been proved.

I say it is absolutely inadequate. There is not  
103 a line of direct proof, such proof as is necessary in a criminal case where great exactitude is required, to show that the question sought to be elicited from the defendant in Count No. 7 had anything whatsoever to do with lobbying.

Now, if the Court please, let's take first the Lobbying Act itself. The Lobbying Act, if the Court please, contains no definition of lobbying.

Congressman Buchanan on the floor of the House, in June, was asked to define lobbying. He said he couldn't.

A fellow member of the House said, "What in the world are you trying to do, trying to investigate something and you don't know what it is?"

Lobbying has been defined, if the Court please, by the Supreme Court and by the federal courts and by the state courts, and I refer to those definitions as supplementing the definitions ordinarily found in the dictionaries and in the text books, and in no one of these definitions, if Your Honor please, will Your Honor or the prosecutor or anyone else find that the sale of books amounts to lobbying.

I keep repeating that this is a criminal case, and great precision and great exactitude is required of the Government in proving its case in chief.

Now, with respect to the proposition of lobbying, the Supreme Court in *Trist vs. Child*, 88 U. S. (21 Wall.)

441, said:

104 "Lobby services are personal solicitations by persons supposed to have personal influence with members of Congress to procure the passage of a bill." The New York courts have defined lobby services as follows:

"'Lobby services' are generally defined to mean the use of personal solicitation, the exercise of personal influence, and improper or corrupt methods, whereby legislative or official action is to be the product. It is not, however, the doing of the improper act which is the sole test. A contract for such services is void, and cannot be enforced."

In the case of *Burke vs. Wood*, 162 Fed. 533, the federal courts defined a lobbyist as follows:

"A lobbyist is one who solicits members of the legislative body, in the lobby or elsewhere, with the purpose of influencing their votes, and a contract to render such services, or services which consist in part of lobbying, is void as against public policy, and an action cannot be maintained thereon."

The California courts have defined lobbying as follows:

“‘Lobbying’ which has a well defined meaning, and signifies to address or solicit members of the legislative body for the purpose of influencing their votes, is contrary to public policy.”

105 Now, reading from the Congressional Record of June 21, 1949. This is a discussion from the floor on the subject of lobbying, which I think is helpful to Your Honor.

“Mr. Buchanan. I may say that the Committee on Lobbying has come to no conclusion as to any definition of the word ‘lobbying’.

In other words, the chairman of this Investigating Committee refrained from the task which the prosecutor in this case asks Your Honor to undertake, not only to undertake but to hold that publication and dissemination of a book amounts to lobbying.

Following that Mr. Buchanan said:

“Mr. Buchanan. I would remind the gentleman from Michigan that ours is an investigating committee, not a legislative committee; that the definition of the word ‘lobbying’ comes within the realm of the proper legislative committee of the House; it is up to them to define the term and to make their recommendation.

“Mr. Hoffman of Michigan. With all due respect if the chairman of the committee investigating lobbying cannot give me a definition of lobbying, I cannot see how he is going to get very far. How can a committee investigate lobbying if it does not know what it is looking for, if it does not know the definition of lobbying?

106 “Mr. Phillips of California. I came in when a statement was being made by the gentleman from Pennsylvania in which I understood him to say that the committee had not yet determined what lobbying was. Am I correct in that?

“Mr. Hoffman of Michigan. That is correct.

"Mr. Phillips of California. How can you investigate something if you do not know what it is?"

"Mr. Buchanan. I might say that in the present Lobbying Act there is no definition, and I do not feel that it is within the realm of the investigating committee to state at this stage of the game and set up any definition of the term lobbying."

I repeat, the chairman of the investigating committee shrank from according a definition, which Mr. Hitz now asks Your Honor to supply.

THE COURT: Isn't that supplied by the resolution?

MR. BURKINSHAW: The resolution does not define lobbying. Your Honor has the resolution before you. What is the page of the transcript there, Mr. Hitz?

THE COURT: It says:

"The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the federal government intended to influence, encourage, promote, or retard legislation."

MR. BURKINSHAW: Now, to go on with the subject of the definition of lobbying—

THE COURT: You don't give any significance to the fact that the resolution spells out the activities?

MR. BURKINSHAW: I don't think so, particularly not in a criminal case. A man shouldn't be required to guess at what he is being charged with. He is entitled to an indictment precisely stating the offense. And if the chairman of the investigating committee can't provide a definition of lobbying, and the prosecutor can do no better than he has done here today, then I say the man is entitled to a directed verdict of acquittal.

THE COURT: To go back to Government's Exhibit No. 2, on its face, in paragraph 2 it states:

"The committee is authorized and directed to conduct a study and investigation of all lobbying activities in-



tended to influence, encourage, promote or retard legislation."

MR. BURKINSHAW: But there is no proof of that, if the Court please; there is absolutely none.

THE COURT: I don't understand when you say "no proof."

MR. BURKINSHAW: The only proof here is that the question was asked, Who is the woman from 108 Toledo who gave you \$2,000 for the distribution of The Road Ahead?

Now that doesn't fall within the ambit of lobbying activities. It doesn't have anything at all to do with lobbying per se.

But let me finish on this line; I think I can be very helpful to the Court on this subject of lobbying.

THE COURT: All right.

MR. BURKINSHAW: Webster's New International Dictionary defines lobbying as follows:

"To address or solicit members of a legislative body in the lobby or elsewhere, as before a committee, with intent to influence legislation."

I might say that dictionary definition happens to accord essentially with virtually every other dictionary.

THE COURT: That accords with the resolution, too.

MR. BURKINSHAW: Certain states have defined lobbying. Georgia defined it as "personal solicitation not addressed solely to the judgment of the legislators."

Louisiana defined it as "an attempt to influence the action of a member of the legislature by any method other than appealing to his reason."

But now, if the Court please, and I have very serious doubt as to whether the investigating committee itself was aware of this—

THE COURT: I didn't hear you.

109 MR. BURKINSHAW: I have very serious doubt as to whether the investigating committee knew in detail of the terms of the Lobbying Act, because,

if the Court please, the Lobbying Act provides an exclusion with respect to publishers of daily newspapers and magazines; and I say that exclusion, if the Court please, is most helpful in coming to a determination as to whether or not the publication and dissemination of a book falls within the ambit of lobbying.

Under Title 2, Section 267, under the heading "Registration of lobbyists with the Secretary of the Senate and Clerk of House," it starts off:

"Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing any thing in furtherance of such object, register"

110 Q MR. BURKINSHAW: Parenthetically I observe, if the Court please, the government in its effort to streamline this case omitted to prove as part of its case in chief that the defendant in this case was engaging himself for pay. That is one of the very many discrepancies, if the Court please, that I find in the government's presentation of its case.

But dropping down in that paragraph the significant language that I say is awfully helpful on the matter of exclusion of the publishing industry, I read as follows:

"The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity;"

Now here is the payoff language:

"nor in the case of any newspaper or other regularly published periodical (including any individuals who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodi-

cal, or individual, engaged in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition of such legislation."

I strongly urge, if the Court please, that the Congress of the United States, enacting the Lobbying Act, wanted to be careful to see to it that the editor of the Washington Star should not be yanked into court here to answer an indictment for a violation of the Lobbying Act, if under his supervision that newspaper published and edited an editorial, let us say, mentioning the desirability of socialized medicine, let us say.

Congress wanted to provide an exclusion, if the Court please, with respect to a commentator, let us say David Lawrence or Pegler, or anybody else, being free to express his views as to legislation appearing before the Congress.

It didn't want a present day Thomas Paine, the great pamphleteer of the Revolution, yanked in before the Buchanan Committee because he published certain aspects of the government's program.

I doubt if Julia Ward Howe, with her Battle Hymn to the Republic, or Harriet Beecher Stowe, with her Uncle Tom's Cabin, would have been free of harassment by Congressman Buchanan and three of his fellow members of the Committee.

I make that distinction because three of the seven members of the committee strongly, stoutly and adamantly denied the committee had any right to go into publishing business and seek to harass one because he had the audacity to print and to disseminate and to publish books.

Why, if the Court please, one of the books published, the Norton book on the Constitution is used as a textbook by the F.B.I. 600,000 copies have been sold of that book. It bears the endorsement of the American Bar

Association. It bears the endorsement of some of the greatest speakers in our public life. For the sale and dissemination of that book and other books, the Committee for Constitutional Government and Edward A. Rumely have been harassed and prosecuted.

Frankly and bluntly, I claim it is a political persecution and prosecution to its tips. In this very hemisphere at the present time we have a very remarkable instance, if the Court please, of how far a legislative body will go when it is invested with the powers that the prosecutor in this case would suggest that these courts have. I refer to the newspaper *La Prensa*, with its editor out of the country and hiding because he is under threat of imprisonment for contempt of the legislature or congress of Argentina because he published editorials and other material in *La Presna* which a dictator government regarded as being reprehensible and was critical of the dictator government.

With respect to the general power of Congress to investigate, I know Your Honor abundantly is familiar with the great landmark of the law of contempt. I refer to the Kilbourn case where seventy-five years ago, following the collapse of J. Cook and Company, a congressional committee undertook to investigate a so-called real estate pool in the District of Columbia.

Kilbourn was summoned as a witness. Kilbourn declined to testify. Kilbourn was convicted by the Senate. Kilbourn went to jail. He was released on habeas corpus. The Supreme Court held that there is no general power of investigation on the part of Congress. Congress hasn't a right to pry into the private affairs of the individual. The powers of Congress must spring from the Constitution and only under those powers which are granted to the Federal Government by the States Kilbourn was freed.

The interesting sequel to it is this, that Kilbourn, following that, filed suit in this court as against the then

Sergeant-at-Arms of the Senate, and obtained a verdict for \$20,000 which the Senate of the United States paid off by appropriation.

The doctrine of Kilbourn versus Thompson has been iterated and reiterated time and time again by our courts, and particularly by the United States Supreme Court.

Even in the Sinclair case, which Your Honor has before you; in the Mally Daugherty case, in 273 U. S.; as a matter of fact here thirteen or fourteen years ago our retired Chief Justice of the Court of Appeals in the case of Hearst versus Black said, in writing an opinion there with respect to encroachments of a legislative committee, that a witness had the right to refuse to comply with demands made by an investigating committee that clearly were outside the purview of that committee's authority,—and I say to Your Honor that in a criminal case, where not one but every element set forth in the indictment must be established beyond a reasonable doubt; in a criminal case where the Supreme Court says that pertinency must be pleaded and proved; in a criminal case where a defendant is entitled to the investiture of the presumption of innocence, that Your Honor, as a Federal trial judge, should not be asked by the prosecution to indulge in surmise and in conjecture and in speculation as to what this man conceivably did, published and sold books, amounts to an activity within the terms of that resolution.

Your Honor is asked to do what the Congress of the United States did not do on enacting the Lobbying Act.

That is define lobbying.

115 Your Honor is asked to do what Congressman Buchanan could not do when he was called upon the floor of the House of Representatives, and he could not define lobbying.

Your Honor is asked to hold the conduct in this case to be lobbying, yet the very Lobbying Act itself, upon



any reasonable reading and appraisal, conveys the very definite conviction that it was the meaning of Congress to exclude the publisher from the operation of the act, and to leave free, as always has been in the history of this government, the right of the publisher of a paper, the publisher of a book, the occupant of a pulpit, to express and explain his views as he see fit.

The freedom of the press provision is the very first amendment to the Constitution. Historically it probably had its genesis in the case of Peter Zenger, who in 1735 defied the British Colonial Government of New York, and went to trial in New York because his publication had the effrontery to question the colonial government at that time. Zenger was freed and his acquittal was one of the great landmarks in our history.

I say this: in the absence of a definition of the act as to what constitutes lobbying; in the absence of a definition on the part of the investigating committee as to what constitutes lobbying; in the absence of any  
116 language in the resolution that would clearly—not possibly, but clearly—bring the activity of a publisher within the ambit of this act; with the Supreme Court holding that pertinency must be pleaded and proved; and with the very Lobbying Act providing what appears to me to be an exclusion with respect to publishers, I say, if the Court please, the defendant in this case is entitled to a judgment of acquittal.

**THE COURT:** Let me see if I understand you, Mr. Burkinshaw.

Are you making a challenge as to the constitutionality of the Act itself, or are you saying that this particular case is without the act?

**MR. BURKINSHAW:** I say this, if the Court please. Congress, of course, has a right to regulate lobbying, no question about that, and it is a most desirable thing, because we are all aware of the pernicious aspects of lobbying.

However, Congress has been sedulously careful; if you please, not to trespass on long-held and zealously guarded rights of free American citizens.

I say in that state of the record with regard to congressional enactment, Your Honor should not be asked or required to do something particularly in a criminal case, that the Congress has not definitely and  
117 explicitly given Your Honor the right to do.

In other words my contention is that you can't guess this man into a conviction for violation of the Lobbying Act. We have to have something much more than has appeared in the government's case here today.

I say there is nothing but two isolated facts which Your Honor is asked to bridge by way of surmise or conjecture and say on the basis of these two isolated facts this amounts to lobbying. Why even the first count, you remember, if Your Honor please, in the first count, and I think probably the draftsman of the indictment had in mind putting the amount of \$1,000 in there with a view possibly to bringing this within the ambit of the Lobbying Act, but even there, in addition to poor pleading, his mathematics are in error, because a man is entitled under the Lobbying Act to receive not to exceed \$500 in one year, without assuming the duty of reporting.

The period as covered in the first count and in the sixth count runs, as I remember it, from January 1, 1947 to May 1, 1950. If my mathematics are correct that is a period of fourteen months or roughly the equivalent of \$25.00 a month, so that a year's take, unless specifically proved by the government, would amount to far less than \$500 a year.

I think the government might have had that angle in mind but unfortunately fell in error with respect  
118 to the mathematical aspects.

THE COURT: Actually here we are not concerned with whether it be or not be a violation of the Lobbying Act; this is a very different act. This is

failure to produce or to answer a question. Whether they used \$500 or \$1,000 may have been for the purpose of convenience; I don't know any better than you do what the reason was.

Actually, if I understand you, Mr. Burkinshaw, you are not challenging the act as it stands, but you are saying the act did not intend to comprehend activities of the character here involved.

MR. BURKINSHAW: That is it precisely.

THE COURT: And you are saying that by general intention of the act, and by use of certain language which you have read in connection with 267.

MR. BURKINSHAW: That is my contention, precisely.

THE COURT: Now, going back to the necessity for alleging and proving, do you still say that the mere allegation of pertinency in the context here was not sufficient under the existing rules, particularly where you have a right to come in with a motion to ask that it be made more definite and certain?

MR. BURKINSHAW: I say first that it is not within the provision of any lobbying investigation. Secondly, I say under the Constitution of the United States this cannot be.

119 Third, that it has not been proven as the Supreme Court requires.

I say the Lobbying Act itself provides an exclusion with respect to publishers.

I say the defendant in this case was under no requirement whatsoever to answer any question as to what books he sold to the lady from Toledo.

THE COURT: Do you recognize any difference, whether it be a commingling of activities such as publishing books and also engaging in lobbying propaganda or activity?

In other words, assume that your premise be correct, Mr. Burkinshaw, that publishers as such would be im-

munized by the Act, and they step over the barrier and become engaged in added activity, would that be sufficient to permit them the immunization which they might otherwise have?

MR. BURKINSHAW: I don't see, if the Court please, anything in the law or in the cases that takes a publishing business, the running of a newspaper or magazine, of publishing books or pamphlets generally—anything, that puts it within the authority of a congressional committee investigating lobbying.

If the converse were true then every editor in the United States would have to be registered under the lobbying Act. I don't think Congress ever intended that.

I think Congress' intention is rather adequately made known by this specific exclusion of the paper and of the periodicals which, to my mind, at least, points to a recognition on the part of Congress of the right always enjoyed by Americans to espouse or denounce legislation or government functioning in any aspect.

I don't see, particularly in a criminal case—and I keep reiterating that—that Your Honor, in being asked to hold that the activities of a publisher come within the lobbying definition, I can't see.

THE COURT: Assume the Act did in terms list publishers—

MR. BURKINSHAW: It goes about as far as it can in that respect.

THE COURT: I am asking you to assume that it does in terms do that: Wouldn't a legislative body, faced with the necessity of lobbying, have a right to look at the possibility of amendment of such legislation or change of such legislation?

MR. BURKINSHAW: I think the legislative body has an absolute right, if the Court please, to set up a system of regulations and safeguards and requirements generally with respect to lobbying, and I think such re-

quirements would be upheld, but until the Congress sets up such a thing then I say the courts have no right to.

Mr. Maher suggests to me, and I think this is important, that I make a tender to you at this time,

121 if the Court please, as part of this argument, a tender to you that of the seven members of the

committee Representative Halleck, Representative Clarence Brown and Representative O'Harra, members of

this investigating committee, not only questioned the right of the committee as part of its functioning under

that resolution to go into the subject of publishing, but in effect held that the activity of their brethren in pur-

suance of that object amounted to an encroachment upon rights guaranteed Dr. Rumely under the Constitution

of the United States. I remember Clarence Brown of Ohio, saying, "The Road Ahead?" He said, "I bought

dozens of copies of that myself and sent it out to friends; I thought it was an interesting book, a good book."

He said, "Am I a lobbyist in doing that?"

I have the hearings here, and Your Honor has the hearings, and throughout the entire hearings is this

question raised by three of the members of the committee as to whether or not interrogation of a witness

with respect to his published activities amounted to lobbying. I say it is highly, highly important. But I

keep repeating, if the Court please, this is a criminal case. Your Honor is not free to indulge in speculation

or conjecture as to whether a given activity might fall within the purview of lobbying. Your Honor should not

be required to do that. It is the function of the government to establish its case beyond a reasonable doubt,

and on the basis of facts that will uphold the

122 indictment and each one of its every single, solitary averments.

I say this: Your Honor is asked to speculate or to infer that because Benjamine Fitz Gerald, an attorney

for the committee, stated as his opinion—you notice it



was so observed by Representative O'Harra—that because a counsel for the committee was of the opinion that this book went so far as to be critical of legislation, then it amounted to lobbying.

Another thing: Let's get back to some old fashioned essentials in a case. Your Honor has prosecuted—I have, too. If Mr. Hitz is going to suggest and argue to Your Honor that requirements of the Supreme Court with respect to pertinency are upheld by the contents of The Road Ahead, why hasn't he introduced it in evidence? It is not before Your Honor. Is Your Honor privileged to proceed to a determination by Mr. Hitz solely on the basis of an opinion expressed by Mr. Fitzgerald? We have all had too much experience in prosecuting, if the Court please, to lead to any such silly conclusion as that.

THE COURT: We get into the matter of investigating things which are not proven, and that is the reason why we have the investigation.

MR. BURKINSHAW: Oh, yes. All of us are tremendously impressed by the Kefauver investigation; we are tremendously impressed.

23 THE COURT: No, what I meant, Mr. Burkinshaw, you don't have to establish beyond a reasonable doubt the existence of certain things which would prompt movements of the committee in its matters under consideration.

MR. BURKINSHAW: I say this, though, if the Court please. I think that the Government has to establish, as the Supreme Court ordained, that this is pertinent. I have made tender here of three witnesses of this committee, and who can know better what a committee is doing than the members of the committee entrusted by Congress with that task? These three members of the committee, and they are ready to appear here and testify, are of the conviction, if the Court please, that

the investigating committee had no right to go into that field.

THE COURT: You wouldn't want to use their opinion any more than you would Mr. FitzGerald?

MR. BURKINSHAW: Yes. I am very glad you asked that question. I say a member of the investigating committee, designated by the Speaker of the House, and entrusted with the task of carrying out that task, is a very important, very valuable witness as to the scope of that committee's activities.

On the subject of Mr. FitzGerald, I assume Your Honor is familiar with the Franksfeld case decided by Justice Letts, reported in 32 Fed. Supp. The facts 124 in that case are these. A witness, Franksfeld, appeared before the House Un-American Activities Committee; refused to answer certain questions—I believe one of the Commies with whom the court have been dealing so abundantly of late. For some reason Mr. Stribling, a very able attorney, and attorney for the committee, went before Needham Turnage and swore out a warrant for the contumacious witness, Mr. Franksfeld.

Mr. Franksfeld was brought in and placed under bond for the action of the grand jury.

Mr. Justice Letts promptly turned him loose and said that the attorney for the committee, Mr. Stribling, was indulging in an activity that was well beyond his authority and was a function of the committee.

So I ask Your Honor to consider that case, the Franksfeld case, reported in 32 Fed. Supp., as bearing upon the proposition of how much weight is to be accorded the opinions of Mr. FitzGerald on a book that was not before the Court, that was not brought in evidence and which he, the witness, said is critical of various aspects of government policy as of this day.

I go back to your proposition that I do not believe Your Honor should be asked to speculate or to surmise on the proposition of whether the publisher or seller of

books lies within the purview of a lobbying investigation, particularly in view of the fact that neither the Act  
 125 requiring registration of lobbyists contained a definition of lobbying; in view of the fact that the chairman of the committee couldn't define or give a definition of lobbying; in view of the further fact that to my mind at least the Lobbying Act seems to provide an exemption or an exclusion with respect to the publisher; I don't think, if the Court please, there is anything in the Government's case that should ordain that you permit this case to go to the jury.

I believe, if the Court please, that the defendant is entitled to a directed verdict of acquittal.

THE COURT: Suppose we recess for about ten minutes.

(Short recess)

MR. BURKINSHAW: May I add just one or two sentences to what I said?

THE COURT: Yes.

MR. BURKINSHAW: In the first place, it has been suggested to me by my associates that I should answer  
 Your Honor's question as to what Your Honor  
 126 termed commingling of activities. I see no commingling of activities.

One, there is a registration there, under protest. The registration; and particularly under protest, certainly falls far short of denoting that this man is a lobbyist. If anything, the registration under protest would be a formal denial at the outset on the part of this defendant that he was engaged in lobbying.

As for publication of books I say this to Your Honor: The publication and dissemination of books is not lobbying; does not fall within the definition of lobbying; and I go so far as to say this, that in my humble view if Congress were to enact legislation, if the Court please, making the publication of books and the dissemination lobbying, subject to regulations, in my humble opinion,

if the Court please, such legislation would be absolutely unconstitutional as being in conflict with the rights guaranteed under the First Amendment.

So that Your Honor not alone is asked to speculate as to something that does not appear in the Act, I venture the opinion Your Honor has been asked to go so far as to indulge the presumption that the area covered by this Lobbying Act is so vast in extent that it absolutely encompasses a field where I say the Congress is not free to legislate.

Congress cannot legislate with respect to limiting a free press or free speech. All congressional legislation must be within the confines of those powers granted 127 by the states and set up in the Constitution of the United States.

THE COURT: Is the requirement of giving names and addresses an infringement on freedom of speech?

MR. BURKINSHAW: I think so.

THE COURT: How?

MR. BURKINSHAW: I think anything that encroaches on an activity that is sedulously safeguarded by the Constitution of the United States is outside the purview of a congressional investigating committee.

Now, if Your Honor please, it was only Friday, as I remember it, that our Court of Appeals passed on the proposition of the young lady named Block, a government employee, whose desk in a government office was entered without her permission. She was convicted of petty larceny in the Municipal Court of the District of Columbia and the case was reversed because the action of the police authorities in going into her desk, which she did not own but over which she simply had control, was an invasion of her rights under the Fourth Amendment.

The Court of Appeals the same day, and I think Your Honor will know this better than the other case because the Court of Appeals that day affirmed Your Honor in

the John L. Lewis case, and that had to do, as I remember the newspaper reports of Your Honor's opinion at the time of your decision in that case, and as I 128 remember the language of the Court of Appeals last Friday that dealt with the inadequacy again of the Government's proof.

In that case the Court of Appeals held that the Government neither pleaded nor proved what was incumbent upon the Government to prove in order to make this case stand up against the Mine Workers.

So I say that case is important because today we are dealing with an averment on the part of the Government that has not been pleaded adequately and certainly has not been proved. And I reiterate that again Your Honor is asked to indulge in speculation in a criminal case in order to let this case go to the jury. And I say under the law as I know it, Your Honor is not so privileged; that the Government must make out every aspect of this case in its entirety so that the jury shall not be asked or required to speculate as to the essential, relevant elements in this case.

THE COURT: Mr. Hitz.

*Argument in Opposition to Motion for Directed Verdict  
of Acquittal.*

MR. HITZ: Your Honor, Mr. Burkinshaw has fallen into the mistake I think of trying to urge upon Your Honor that we are trying Mr. Rumely here for some violation of the Lobbying Act, and we are not. Therefore, we do not have to prove, although I believe it could be proved, that the publishing business, as 129 Mr. Rumely was engaged in it, was actually lobbying under the definitions.

All we have to prove is that the Congress had a right to investigate an activity that comes so near to it that it would be the subject of legislation.



Mr. Rumely himself thought he came so near to it that he thought he was under the Act and he registered. It is true he registered under protest, but if he felt strongly that he didn't have to register, he wouldn't have done it; he felt strongly that he didn't have to give these papers to the committee, but he felt he was under the Act or he would have protested that, as he did everything under the subpoena that he didn't care to divulge.

Mr. Burkinshaw states that we have offered the opinion of Mr. Fitzgerald with reference to the legislative purpose of the book *The Road Ahead*. We did not offer Mr. Fitzgerald's opinion on that, because I think it might be incompetent, exactly as would be the testimony of Mr. O'Harra and Mr. Brown of the committee if they came down here and said they thought the subpoena was too broad, that the resolution was not sufficiently broad to cover the subpoena.

We offered Mr. Fitzgerald's testimony which I last read into the record, as being testimony which stated the contention of the entire pamphlet *The Road Ahead*. He stated it dealt with those various subjects, and I think that adding all of those subjects together it is clear  
130 that there was a purpose to attempt to influence legislation, not only in the way those subjects are grouped together, but in the way the lady from Toledo sought to make use of that book.

It wasn't that she was buying \$2,000 worth of that book—probably a number of thousand copies of it; she was giving \$2,000 to the organization for the distribution of the book, an entirely different situation, and one exactly within the purview of this committee to determine whether there was any violation of the Lobbying Act, or whether it was an activity that was not even included in the Act. It was clearly within the field that they could investigate their legislative purposes.

The rest of Mr. Burkinshaw's argument was very

interesting but doesn't shake me in the position that we have always taken, and take now, that pertinency is obvious in this case.

THE COURT: I will deny your motion at this time, Mr. Burkinshaw, without prejudice to renewing it if you see fit.

MR. BURKINSHAW: It is denied without prejudice and with the provision that I be permitted to renew it at the end of the case?

THE COURT: Yes.

131 THE COURT: Before you leave that, what do you want to show by these gentlemen? If there is any way we can save them from coming maybe it can be stipulated.

MR. BURKINSHAW: No, I don't think so.

I don't want to ask any questions that would seem to be a violation of Your Honor's ruling, but as a matter of record I want to ask of Your Honor two questions.

At this time I should like to have in my record the testimony of these three witnesses, first, as to the proposition that there never was held, prior to the issuance of the May subpoena, a meeting of the so-called  
132 Buchanan Committee for the purpose of authorizing the so-called May subpoena. I want that in the record of this case.

THE COURT: Can you stipulate that?

MR. HITZ: I will stipulate that they would so testify.

MR. BURKINSHAW: I would rather put them on.

THE COURT: Let's go on and see what you want to proffer. What date was that subpoena?

MR. BURKINSHAW: The subpoena was served on May 26.

MR. HITZ: Issued on May 25.

MR. BURKINSHAW: It was issued May 25 and served on May 26.

MR. HITZ: I will stipulate that would be their testimony.

MR. BURKINSHAW: I am not content with the stipulation.

THE COURT: In other words, what you would like to prove is that they never held a meeting prior to the issuance of the subpoena?

MR. BURKINSHAW: That is one thing.

MR. HITZ: I do want to be heard on that. This is an offer of proof for the record. He isn't trying to prove anything, because the decision has been made by the Court. He is building the record, and I think the offer of proof stipulated by the Government is ~~will~~ that his record is really entitled to show.

THE COURT: I haven't said anything to the  
133. contrary, yet, Mr. Hitz.

MR. HITZ: I know, but that is the reason I wanted to say what I did before you made a ruling.

MR. MAHER: Do you want to state, also, Mr. Burkinshaw, whether you are going to ask these three witnesses anything with reference to the pertinency question?

MR. BURKINSHAW: Yes. I propose to ask these three members of the committee what they were investigating, because running all through this hearing is this very, at times almost violent dissertation of the committee on the subject of whether the investigating committee had a right to go into publishing.

THE COURT: I don't see much difference between the opinion of them and the opinion of Mr. FitzGerald.

MR. BURKINSHAW: Here is the thing—

THE COURT: Let me interrupt you, Mr. Burkinshaw. The first thing that you have got, that you would like to prove, is they never held a meeting prior to the issuance of the subpoena on May 25.

MR. BURKINSHAW: That is right.

THE COURT: What is the second thing?

MR. BURKINSHAW: I want to ask the three mem-

bers of the committee what they were investigating, and particularly if they were investigating the publishing and sale of books.

134 THE COURT: All right, sir. And if they were called what would you expect them to testify to?

MR. BURKINSHAW: They would prove that as members of this committee, acting under this resolution, they did not consider that they had any authority to investigate activities in the publishing field.

THE COURT: What else?

MR. BURKINSHAW: That is about all. Those are the three things.

THE COURT: Wait a minute. I have the first one and I have the second one, but unless you have your second one divided in two parts, what they were investigating and whether they were investigating the sale of books—

MR. BURKINSHAW: Yes; so there are only really two propositions.

THE COURT: All right.

MR. BURKINSHAW: With respect to that I don't know of any better witness as to what a committee is doing or seeking to do than the members of the committee itself.

THE COURT: All right. What do you say to this, if anything, Mr. Hitz?

MR. HITZ: I think I have said everything about No. 1 that I need to, namely, we will stipulate that would be their testimony.

However, if that testimony is offered we would like to be able to offer the testimony of the three members  
135 of the majority to the effect that prior to the issuance of the subpoena of May 25, that the chairman contacted each of those three by telephone and each one agreed that the subpoena should be issued to Mr. Rumely.

In other words, they authorized it but not in the formality of a meeting.

The fourth member of the majority was the chairman himself, who signed the subpoena, so that makes four out of the seven actually voting for that.

MR. BURKINSHAW: I didn't know that, but if Mr. Hitz says that is the case, I shall, of course, accept it.

MR. HITZ: Judge Lanham is here now to testify to that. Mr. Albert is here to testify to that, and Mr. Doyle is in a meeting of the Un-American Activities Committee this morning, but stated he was called long distance, in California, by the chairman in order to obtain the authority of these members.

MR. BURKINSHAW: I will go so far as to stipulate with you that Congressman Doyle stated in an open meeting, at which I was present, that he was telephoned very early in the morning by Congressman Buchanan, and I think I can even get that section out for you. I don't question that at all, because I was present. I remember he said he was called very early in the morning.

MR. HITZ: So there is no question about the 136 fact of the call?

MR. BURKINSHAW: There is no question as to the fact of what Congressman Doyle said as to receiving a call as to that. I will get the appropriate section of the record there and turn it over to you in a second and you can read it.

MR. HITZ: With reference to that, Mr. Lanham would say he was asked and he approved of it, and Mr. Doyle was asked and he approved of it, and Mr. Albert was asked and approved of it in advance but not in a meeting.

MR. BURKINSHAW: It was not formally done by the committee.

MR. HITZ: Let's leave out the conclusion. It was done individually by all those three members of the majority of the committee.



THE COURT: And that means also Buchanan.

MR. HITZ: And Buchanan, the chairman, of course, signed the subpoena.

That disposes of our position with reference to No. 1.

With reference to point 2, I am not sure I understand fully what it is over and above an expression that the subpoena and the question asked of Rumely lacked pertinency, and if that is his purpose I will stipulate that Mr. O'Harra, Mr. Halleck and Mr. Brown would testify that the questions and the subpoena lacked pertinency to the committee.

However, I make that offer of stipulation on the 13<sup>th</sup> additional theory that I consider nevertheless the testimony would be inadmissible as immaterial and incompetent.

THE COURT: In other words, if they were called, that is what they would testify, if the Court permitted it on the ground of materiality and relevancy?

MR. MAHER: Mr. Burkinshaw, would not these three congressmen also testify that during the hearings that Dr. Rumely answered some 919 questions?

MR. BURKINSHAW: Oh, yes, of course.

THE COURT: I don't think that makes a particle of difference.

MR. BURKINSHAW: I want that in view of Judge Lett's decision in the Browder case, where Judge Letts pointed out that he answered a number of questions.

THE COURT: Not produced on the record. As far as that is concerned, I will hold that is not material. I think he might answer any number of questions and still refuse and make a wilful violation of the statute, apart from the proposition such as I had in the Branca case the other day where you are pleading immunity; there I agree with you that the setting and context are entirely and distinctly different, but in this type case I would hold that would be immaterial unless you have something to show me to the contrary.

MR. BURKINSHAW: You say the fact he did answer 919 questions you consider is material, or immaterial?

138 THE COURT: Is not material in this type of case. I concede, Mr. Burkinshaw, where it might well be material in a case with a contempt proceeding where there has been an assertion of immunity under the Constitution, by virtue of the fact that the setting might be such as to reasonably put it in.

I want you to protect yourself thoroughly here.

MR. BURKINSHAW: I would like to make this further statement and I would like to have Your Honor consider it.

THE COURT: Certainly.

MR. BURKINSHAW: I propose, if we do go to the jury in this case, to ask Your Honor to give the charge in the Murdock case on the subject of good faith. That is the charge refused by the trial court and was the sole basis of reversal by the United States Supreme Court, and on your proposition of good faith, as I say, it runs all through this case, the matter of him answering 919 questions; turning loose these agents in his office for two weeks, and I think it is highly material in a contempt case.

THE COURT: If good faith were an element I would agree with you thoroughly, but I am going to hold that wilful does not mean that.

I am going to follow the instructions I gave in the Barsky case showing wilful to mean deliberate as  
139 distinguished from accidental and not with evil intent.

MR. BURKINSHAW: I have read all these cases and I have read the Barsky case.

Your law with regard to contempt in this jurisdiction from my point of view has been chewed up quite a bit, and the history of it, as I see it, is this:

Three or four years ago Judge Holtzoff was sitting in the Fields case. In the Fields case he said, in regard to the transcript of record in that case, he didn't care what two other members of the court had held, he was going to hold that the evil intent proposition, as set forth by the United States Supreme Court, did not apply. That case went along to the Court of Appeals, and Justice Bennett Clark wrote the opinion affirming it.

Now my contention is, with all deference to the trial court and with all deference to our Court of Appeals, if the United States Supreme Court has defined the word "wilful" as used in a criminal case, I say it is absolutely binding on the trial court and I don't think the courts are free to disregard that.

Another thing: In the Murdock case, under the statute charging wilful commission of an offense, here is the case that is reversed because that instruction on the element of good faith was refused by the trial court. Justice

Roberts wrote the opinion. I say that is the law 140 of the land still, and what has been done in the meantime by the trial court or by the intermediate appellate court I say does not divest the United States Supreme Court of its authority first to determine "wilfully" as it sees fit—and by the way, the definition has been followed by the other circuits in the Pullen case and other cases, and I don't think that anything that has been done in the other cases serves to wipe out the force and effect of the United States Supreme Court holding that it is reversible error to refuse to charge in a case wherein wilfulness is an element, refuse to charge on this element of good faith.

THE COURT: I think you are adequately protected here, aren't you?

MR. BURKINSHAW: I not only want to be protected but I want to persuade Your Honor to follow the Supreme Court, instead of Judge Holtzoff.

THE COURT: All right.

MR. BURKINSHAW: Justice Clark, in writing the opinion in the Fields case, took some pains to say the basis of his opinion was based pretty largely on the Townsend case.

In the Townsend case, as was pointed out in the opinion of the Court, the good faith charge was given. There is no question about that; I have got the opinion.

You remember now? Chief Justice Stephens dissented in the Townsend case, but to consider the Fields case alone, without considering the Townsend case on which it is based, I think it is faulty because the Townsend case contained that explicit charge, and I think it is awfully, awfully important in considering whether or not this man in good faith applied for advice of counsel, both to me and to other lawyers, members of his committee, and whether he was actuated by good faith.

THE COURT: In the Barsky case that very thing was argued at substantial length; that he had counsel to advise him.

MR. BURKINSHAW: I say it leaves us in a funny position.

THE COURT: I am bound to hold this way and you are adequately protected, and that is all you need.

MR. BURKINSHAW: All I can do is to make my proffers as we go along.

143 THE COURT: That's right. Do you need to proffer any more? You have each proffer you made so far. What other proffer do you want?

MR. BURKINSHAW: It just depends on—

THE COURT: There isn't any sense in bringing people down here unnecessarily if you are protected.

MR. BURKINSHAW: I want to bring these congressmen down anyway.

THE COURT: What are you going to bring them for?

THE COURT: As a matter of fact the Barsky case was before the Supreme Court twice, and not only on the proposition of wilfully, and the Fleishman case and the Bryan case—

MR. BURKINSHAW: The Bryan case of course was the immunity case, Helen Bryan.

THE COURT: I am not going to give "wilful" in the sense you speak of. I am going to give "wilful" in the sense as distinguished from accidentally.

141 MR. BURKINSHAW: How about the good faith angle?

THE COURT: Good faith isn't in it any more than it would be where they should do it on advice of counsel. If they do it on advice of counsel even it should be on good faith.

MR. BURKINSHAW: I don't want to take up too much time, but after all this entire line of defense is on the proposition of good faith, advice of counsel, all the way through.

THE COURT: So far as good faith in the context of wilful is concerned, I will deny that.

Insofar as your proposition to hold that if Mr. Rumely did act on advice of counsel, it will hold that is not involved.

MR. BURKINSHAW: The question that then comes up is this: Where does a lawyer stand with reference to a Supreme Court decision on a given point?

THE COURT: The only thing I can say to you, Mr. Burkinshaw, is to follow it as best you can, and follow the last one that comes down.

MR. BURKINSHAW: But really, here is the thing: It couldn't be more squarely in point—

THE COURT: I am going to hold, and I want you, to be protected, and I think you are—

MR. BURKINSHAW: There is just one thing I want to add on your proposition of wilful and on good  
142 faith.



MR. BURKINSHAW: I want to bring them down on the fact that no meeting of the committee was held authorizing the subpoena.

THE COURT: I will treat that as a proffer and I will not hear them on that.

MR. BURKINSHAW: You will not hear them on that?

THE COURT: No, sir, because that has been stipulated to, and with reference to whether they considered they had any authority to do it, I will hold that is not material to this issue, plus the further stipulation, as I understand, by Mr. Hitz, that if O'Harra and Halleck and Brown were called they would say it was their opinion they didn't have authority, so I think you are fully protected on that.

Have you got anything else?

MR. BURKINSHAW: No, that is all.

THE COURT: Then I will save you the trouble  
144 of bringing them down.

MR. BURKINSHAW: It does appear as of record that Mr. Hitz is stipulating that if they did appear they would testify they were of the belief that they did not have the authority?

MR. HITZ: Yes, sir, that is correct.

THE COURT: The only other thing I can possibly think of which there could be any question about, you make no issue that they are not physically present when this proffer is made, Mr. Hitz?

MR. HITZ: Oh, no, none whatever.

THE COURT: That is the only thing I can possibly think of.

MR. BURKINSHAW: Well, I think I have made my views adequately known, and so long as I am protected on the record—

THE COURT: All right. Where do we go?

MR. HITZ: May I excuse the congressmen I have here?

THE COURT: Yes, I think you might.

MR. HITZ: I would like to ask if Mr. Burkinshaw makes any point of the issuance of the second subpoena?

MR. BURKINSHAW: I don't know, as yet. I had affirmative statements from all three of these congressmen as to the first subpoena, and I haven't had a chance to talk personally to Brown, or O'Harra with regard to the other. I don't think there is anything in the  
145 record there showing there was any authority for the issuance of the second subpoena.

The COURT: I don't recall that it was dealt with in anything that you gentlemen called to my attention.

MR. BURKINSHAW: No, it hasn't been dealt with in court, and I don't think there is anything in the record indicating that subpoena ever was authorized.

THE COURT: In the final analysis this actually becomes a question of law, doesn't it?

MR. BURKINSHAW: Oh, yes; I agree with you there.

THE COURT: So long as you are abundantly protected, that is all I am concerned with.

Where do we go from here, then?

MR. BURKINSHAW: I would like to have Your Honor go to the Murdock case and reread it in view of what I said this morning.

THE COURT: I will reread it at noon, but I am constrained to do what I told you.

MR. BURKINSHAW: I knew it, and of course I appreciate the fact that Your Honor is completely familiar with these cases, but in view of what I said this morning on the subject of good faith, I should like to have Your Honor consider that charge.

THE COURT: I will be delighted to do it for you, but I am going to adhere to this. I don't want  
146 to give you a false impression.

MR. BURKINSHAW: I know that.

MR. HITZ: We have nothing further.

147 (Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

MR. BURKINSHAW: Another thing I want to take up with Your Honor at this time, even under the language of the Fields and Barsky cases, as bearing on the subject of whether this refusal was intentionally done, it happened that last June before Dr. Rumely was subpoenaed, or before he appeared that he filed in this court a civil action under the authority of Hearst versus Black, seeking to restrain the agents and investigators of the Committee from molesting him or the Committee for Constitutional Government with respect to certain aspects of their publishing business.

The filing of that action, which was handled by my office, had as one of its primary objectives an effort to elicit from this Court as a Court, guidance for him as to his relative rights and responsibilities in the premises.

He set up in that bill of complaint the Resolution under which this Committee was acting and set up the fact that these agents had spent a couple of weeks going through the files and making photostats, or causing him to have photostats made. And he did all this to  
148 evoke an instruction from this Court as to whether or not he was to be subjected to these things.

I think that move on his part in the filing of that action has a very great bearing on the proposition of whether he intentionally declined to give this investigating committee the information sought.

I think the charge in the Fields case was deliberate and intentional, and it is my contention there is nothing a man could do with a view to getting an appraisal, a definition of his rights in the circumstances that would be more pertinent on the subject of intent than addressing, in effect, a request to this Court to give us some guidance in the circumstances.

MR. MAHER: If I am not mistaken, Mr. Burkinshaw, this case was still pending at the time he appeared up in Congress.

THE COURT: I assume you would object.

MR. HITZ: We would object to that.

THE COURT: I will sustain the objection, and you may treat this as an added reason.

MR. BURKINSHAW: Is it the view of the Court that the defense in this case is to be restricted simply to the question of whether or not he did refuse.

THE COURT: I can't tell you what it is going to be, but as it looks to me now, there is not much left other than whether he did deliberately or accidentally  
149 refuse. I haven't recapitulated. I have been sitting here listening to you gentlemen, as you know.

Have you anything else?

MR. BURKINSHAW: No.

MR. HITZ: The only thing I could add would be that the Fields case would limit the defense under these facts to a showing that the failure was beyond his control, that the failure to produce was a failure beyond his control, and as I see it, that would be the only testimony that could be properly elicited from Mr. Rumely, including character testimony, which I think would be irrelevant and immaterial here.

THE COURT: I did not understand there was any contention he could not produce.

MR. BURKINSHAW: There is no contention. I wouldn't be silly enough to make a statement of that sort. Of course this was a deliberate refusal.

THE COURT: That is why I come back to the statement that it looks to me as though it is largely a legal proposition. I was wondering why you hadn't worked out some sort of arrangement whereby we could get the case substantially on a question of law.

MR. BURKINSHAW: Of course I have every intention in the world of renewing my motion.



Because, I think this Committee clearly out of bounds, I think the investigating committee was clearly out of bounds in attempting to go into that field.

THE COURT: I will hear you at such reasonable length as you would expect me to, if and when it becomes necessary.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open Court:)

Whereupon

*Edward A. Rumely*

*Direct Examination*

BY MR. BURKINSHAW:

Q Your full name, doctor? A Edward A. Rumely.

Q Where do you reside, Doctor? A New York City.

MR. BURKINSHAW: Just a moment. Will Your Honor indulge me?

THE COURT: Yes, sir.

BY MR. BURKINSHAW:

Q And at what address in New York City? A 2 East 86th Street.

Q And how long have you resided there? A Since 1915. Not at this address, but in New York City.

151 Q How old are you, Doctor? A Sixty-nine.

Q What is the extent of your education, Doctor? A Where was I born?

Q Yes. A At La Porte, Indiana.

Q Where were you educated? A In the Catholic Parochial Schools, and public schools of La Porte, at Notre Dame University, then at Oxford, in England. Then in Heidelberg, where I studied economics and science, and then at Freiberg, where I studied medicine.

Q Did you take a medical degree? A I am a graduate physician.



Q Have you ever practiced medicine except as an interne? A I practiced a short time as an interne, but not in open practice.

Q When did you obtain your medical degree? A At Freiberg.

THE COURT: What date?

THE WITNESS: In 1905.

BY MR. BURKINSHAW:

152 Q And in addition to medicine, have you engaged in other occupations, Doctor? A While I was in Heidelberg I met Rudolf Diesel, the Engineer, and as my grandfather had founded a threshing machine plant, I was interested in the possibility of using an engine to plow, and when I came back from Europe I started building an oil-burning plow engine, of which we put out the first, and started the traction plowing as a substitute for horses.

Q Were you ever engaged in the educational field? A I had become interested in education. My grandfather gave me a chance to try every possible kind of handwork, and I thought that was good training, so I founded the Interlaken School, where all boys had to spend two or three hours a day doing practical work, gardening, working in the shop, building buildings, in addition to their studies, and many men like Henry Ford who had come from a farm saw the value of that training and sent their nephews or grandchildren to the school.

MR. HITZ: Dr. Rumely, might I interrupt for a moment?

I object to this as being beyond the scope of the question.

THE COURT: I think you are going pretty much in detail into his background.

153 MR. BURKINSHAW: Yes. He has just about concluded.

BY MR. BURKINSHAW:

Q You are connected with the Committee for Constitutional Government, Doctor? You are connected with the Committee for Constitutional Government? A I am connected with the Committee for Constitutional Government. I have been Executive Secretary since it was organized.

Q When was that? A That was in February, 1937.

Q And is that a body corporate? A That at first was simply a committee, but about 1941 its name was changed. First it was the National Committee to Uphold Constitutional Government. In 1941 it was incorporated in the District of Columbia under the name of Committee for Constitutional Government.

Q Where are the main offices of the Committee for Constitutional Government? A In New York City, at 205 E. 42nd Street.

Q Did there come a time in the month of May, 1950, when the office of the Committee for Constitutional Government was visited by some representatives of the Buchanan Investigation Committee? A They were, at that place.

154 Q And do you recollect now who it was representing the Buchanan Committee who came to your offices on that date? A Mr. Louis Little came, coming with two other men.

Q Who were the other men, do you know? A It was on the morning of May 8th. He was accompanied by Walter Halloran, William F. McCarthy, and Walter F. Connell. There wasn't two, but three on that day. Some days there were two, some days three, some days four in the office.

Q Did you know or thereafter did you learn in what capacity Mr. Little was employed by the Committee?

MR. HITZ: Excuse me.

MR. BURKINSHAW: If the Court please, it is purely preliminary.

THE COURT: All right, sir. We will see how far he goes on the preliminaries.

In what capacity was Mr. Little there?

THE WITNESS: Mr. Little said he was the Chief Investigator for the Buchanan Committee, and he showed me a badge.

THE COURT: All right, sir. You have answered the question.

BY MR. BURKINSHAW:

Q At that time did Mr. Little have a subpoena  
155 of the Buchanan Committee with him? A Not to my knowledge, but he had a long list of questions and of things he said he wished to get from us.

Q How many items did he want to get from the Committee for Constitutional Government? A I called Mrs. Pope—

MR. HITZ: Excuse me, Doctor. I should have an opportunity to object, and I do wish to make an objection.

THE COURT: I sustain the objection for the reason before stated, so your record may be protected.

MR. BURKINSHAW: I want to make a proffer. Shall I come to the bench?

THE COURT: I think you have made the proffer.

MR. BURKINSHAW: May I make my proffer?

THE COURT: Yes, you may come to the bench.

MR. BURKINSHAW: On the occasion that these four representatives of the Buchanan Committee came to the offices they served on Dr. Rumely by dictating to his secretary a list of twenty-six items relating to books, records, accounts and correspondence.

156 Doctor Rumely gave them twenty-five of the twenty-six items requested. Doctor Rumely then permitted them, as well as other assistants to remain in his office for something like two weeks, going

through all books, records, accounts, correspondence, with the understanding that they might take out any papers that they wanted, put them aside, and he, Dr. Rumely, would have these items photostated and turned over to the Committee, so that those documents so turned over by Dr. Rumely would cover a space of something like more than 208 pages of fine print.

THE COURT: Might I interrupt you to ask you this?

I am assuming for the moment what you previously said, you don't expect to show that this Committee had previously had the information which they claim that he did not give them.

MR. BURKINSHAW: I am not saying that here. I am simply saying—

THE COURT: This relates to the question of good faith?

MR. BURKINSHAW: Absolutely. Not alone good faith, but the question of compliance. Here is the thing. These people say, "We want these things." It is just part of the entire story.

I don't see how it can be left out, because after they got twenty-five out of twenty-six they then changed the subpoena, because they had all this other stuff, and simply said, "We want this other matter with  
157 regard to the sale of books." It is a question of compliance.

THE COURT: Let me ask you this. You want to make a proffer, I assume, of many things?

MR. BURKINSHAW: Yes, sir.

THE COURT: Why don't I excuse the jury, to come back at 1:30, and let you make your complete proffer at this time, and call them back.

158 MR. BURKINSHAW: Now, if the Court please, there is one element with respect to Count number



6 I am going to take up just a bit out of order, because I want to cover it at this time; lest possibly I neglect it later on.

THE COURT: I understand all you are dealing with Mr. Burkinshaw, is the question of proffer. Is that right, sir?

MR. BURKINSHAW: Yes, sir.

THE COURT: All right, sir.

MR. BURKINSHAW: On count number six, which relates to this so-called August subpoena, the transcript of the record of the hearings of the Committee will indicate that Dr. Rumely appeared and said with respect to the mass of data required by the Committee's subpoena, he had gotten together quite a bit of that by dint of working a number of people something like forty hours, but that in order to get all that the Investigation Committee demanded would entail work of about ten months.

I think what Doctor Rumely has to say with respect to that is highly material with respect to the proposition of intent. If he is called upon to produce books, records, papers, accounts and correspondence, and he says, "I have brought here so much as I can, but I am told that is all my office force"—

THE COURT: Let me interrupt you, Mr. Burkinshaw.

Let us see if we can't get to some point where we come out with something of a definite character.

MR. BURKINSHAW: Yes.

THE COURT: We have had a determination as to what constitutes the question of good faith. I want you to put on the record anything you think is pertinent by way of proffer reflecting that, so that your point may be preserved.

Now, sir, the next thing we are concerned with is, if you are in defense of his failure to produce



names, addresses, saying it was a physical impossibility for him to do it, we will let the Doctor take the stand and so testify.

MR. BURKINSHAW: All right. Fine.

THE COURT: You have no objection to that?

MR. HITZ: No.

THE COURT: That is something we are concerned with. If it was an unreasonable burden, all right, but we are not dealing with that at the present time. I am dealing with what we talked about at the bench, namely, the question of good faith.

MR. BURKINSHAW: That the first subject is covered, I understand that.

With respect to the first count, I propose to show under this count, and I accordingly make proffer at this time of these facts:

That on May 8th Louis Little, counsel for the Buchanan Committee, came into the offices of the Committee for Constitutional Government and made demand upon Doctor Rumely for a mass of material enumerated under twenty-six separate and distinct items, that a copy of the subpoena under which Mr. Little said he was operating was shown to Mr. Bigelow, Doctor Rumely's New York attorney.

That with respect to the twenty-six items, Mr. Little and his colleagues were advised and informed by the Doctor Rumely that they might have access to all his books, to his records, to his papers, his accounts, 161 his correspondence, that they might have everything required, with one exception, that is, the identity of the purchasers of books.

That in pursuance of that arrangement, Mr. Little and his colleagues spent approximately two weeks in the office of the Committee for Constitutional Government, having full access to all their books, records, accounts, and correspondence, and proceeded to place aside all

those books, records, and papers of any kind or description which they said they wanted, and upon being placed aside, Doctor Rumely had these photostated for the Committee, turned them over to the Committee, and these books, records, papers, and accounts are reproduced in Volume 5 of the Buchanan Committee's printed reports, and the great mass of that material is best illustrated by the thought that it occupies 208 pages of fine print in the record of that committee.

I say what Doctor Rumely did there with respect to giving the investigators of the Buchanan Committee access to its records, copies of its records, copies of its accounts and all that has a very definite and specific bearing on the subject of intent.

Now, it is the contention of the government that this was a brazen, defiant, deliberate refusal on the part of Doctor Rumely to comply with the demands of the Buchanan Committee.

162. My answer to that is this, that Doctor Rumely turned over literally piles and piles of correspondence and accounts to these people, and refused to turn over only that information with respect to the identity of quantity purchasers of books, and he took that stand on the advice of his trustees, on advice of eminent counsel included on the Board of Trustees, and on advice of his Washington lawyer.

I say it all has a very definite bearing on the subject of whether he intentionally defied and brazenly was ignoring the demands of this Committee.

In the Maragon case, here just a few months ago, I noticed Judge Prettyman—

THE COURT: I don't think you have to argue the proffer to protect yourself, Mr. Burkinshaw. Suppose you make your proffer, and then you can argue from that.

MR. BURKINSHAW: Well, my proffer, in addition to facts relating to Doctor Rumely turning over this

great mass of material in his office next will include his cooperation with the National City Bank of New York in having made available to the Committee all these microfilm records possessed by that Bank relating to deposits, withdrawals, and banking generally by the Committee for Constitutional Government in that Institution, which was the principle depository of that Institution.

My proffer, also, will extend, if the Court please, 163 to the fact that in May of 1950 when these investigators were working in the offices in droves, he caused to be filed in this Court a civil action under the authority of *Hearst versus Black* in our Court of Appeals, seeking the instructions of this Court as to his relative rights in the circumstances.

I say the filing of that action, I say the recitals contained in that bill of complaint are material as bearing on the proposition of intent.

In other words, here is a man charged with intentionally and deliberately defying a congressional committee, and his answer is this: -

I took the stand I did after consulting counsel, and after asking this Court to instruct me as to my relative rights in the circumstances.

I desire further to show that that action of his was pursued by him in the Court of Appeals and remained in the Court of Appeals until such time as the defendants named in the bill of complaint, that was the agents and investigators of the Committee, had left the employment with the Committee, so that the case then became moot.

I say that I make proffer of that general line of testimony at this time since I believe it has a tremendous bearing on the subject.

I want also in my proffer to include this, that 164 prior to the Lobbying Act becoming law on August 2, 1946, that the Committee had published and sold 2,054,000 books.

I want my proffer to include that both before the Lobbying Act and since the Lobbying Act the Committee for Constitutional Government have published and have sold a wide variety of books, virtually every one of these books dealing with the primary subject of the Committee for Constitutional Government, that is, upholding the Constitution of the United States.

I want my proffer to include that during the years that this Committee has been operating it has published and distributed 233,000,000 items of literature.

I want my proffer to include the Committee for Constitutional Government has published and sold 597,000 copies of the Norton book on the Constitution, which book, as I say, is used by the Federal Bureau of Investigation as a textbook, which book has the endorsement of the American Bar Association in that the American Bar Association designated the late James M. Beck, former Assistant Attorney General of the United States, to select of all the books on the Constitution one which the American Bar Association might choose as the best book on the subject.

I want to show with respect to the Norton book the Committee for Constitutional Government has published and has given away hundreds of thousands of 165 copies of that book to 800 or more American universities and colleges. I even noticed my own Alma Mater in the list took some 2,700. But these were given away.

I want to have my proffer include the fact that Doctor Rumely appeared before the Buchanan Committee on five separate occasions.

I want my proffer to include that on the occasions of his appearances he was asked and answered a total of 919 questions dealing generally with respect to the activities of the Committee.

I want my proffer to include the fact that the printed volumes of the testimony of the Buchanan Committee



shows that 140 pages were devoted to the questioning of Doctor Rumely.

I want to show that 358 pages of the volumes are devoted to copies of books, records, papers, and correspondence turned over by Doctor Rumely to the Buchanan Committee at the time these investigators were going through the office.

I make these proffers, if the Court please, and I make this general proffer, broken up as I have indicated at this time, as bearing on the proposition of intentional defiance of the Buchanan Committee. I say it is material, and I say it is relevant.

I say that it shows, as a general thing, that this witness turned over, himself, his books, records, 166 papers, and correspondence, and accounts, to the extent I have seldom known a witness so to do before a congressional committee, and withheld only that which he was advised by counsel the Buchanan Committee had no right to demand.

I say it has a great bearing on the subject of intent, and I think testimony along the lines indicated in my proffer is admissible.

Mr. Maher calls my attention to the fact, and I think it is a very good suggestion, that the subpoena called upon Doctor Rumely, I will read now from Court Number 1, for the "name and address of each person from whom a total of \$1,000 or more has been received by the Committee during the period January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to receipts from the sale of books, and other literature."

Your Honor will remember a few moments ago I stated that during the period of the Committee's operations it had printed and distributed 233,000,000 pieces of literature.

I want the fact of the number of pieces of literature published and disseminated by this Committee to go into evidence as bearing on the proposition of whether it was



a physical possibility for Doctor Rumely or anyone else to comply with a demand such as that. You have got 233,000,000 pieces of literature published and sold.

I say the facts and related facts which I have  
167 just brought to your Honor's attention, especially, are highly material on the subject of intent.

I think it would have been a physical impossibility. I think Doctor Rumely in his testimony on August 25, or 26, told the Buchanan Committee that the National City Bank of New York informed him that to comply in entirety with the demand made by the Buchanan Committee on the Bank for records, bank records of the Committee for Constitutional Government would require the services of ten or twelve men and working full-time for a period of ten months. I say that that has a very distinct bearing on the subject of whether this is an intentional refusal.

I respectfully submit, if the Court please, the effort of the Government here would seem to be along the line of cutting off anything with respect to Doctor Rumely's intentions, with respect to Doctor Rumely's ability so to produce.

THE COURT: Excuse me, Mr. Burkinshaw, I suggested to you that Doctor Rumely might testify it was impossible for him to comply, and I understood there was no objection from the Government. Is that right?

MR. HITZ: I think it should have been raised at the time of the Committee hearings. I think it comes too late, now, and therefore would be immaterial on that ground.

168 MR. BURKINSHAW: The matter of physical impossibility was raised at the time of these committee hearings, and it appeared in the transcript. I will be happy to read those portions to you.

THE COURT: Let us get all your argument, so we can close this phase of it.

Have you anything?

MR. BURKINSHAW: I don't think so. Certain exigencies may develop in the trial of this case that may cause me to supplement my proffer.

THE COURT: But so far as you know, at the present that is all?

MR. BURKINSHAW: So far as I know, at the present, I think I have given Your Honor a general idea of what I think should go in as bearing on the subject/of intent.

Did you want to say something, Mr. Maher?

MR. MAHER: I was about to make this observation, Mr. Burkinshaw. I think that the extent to which he did comply with the subpoena is material on the question of his physical ability to comply with the entire demand. I think that Doctor Rumely's testimony as to what he did and how many people he had engaged in doing the other things that the Committee demanded, has a bearing on the question of whether he deliberately did this thing, namely, whether he deliberately withheld.

169 Now, I think Doctor Rumely can testify or can show to the Court everything that he did towards compliance, and, secondly, that would have a bearing on whether or not it was physically possible for him to comply with the twenty-six items.

Do I understand Your Honor is excluding from testimony the things he did to comply with the subpoena?

THE COURT: I understood this was offered on the proposition of good faith, and as I understand the law, that is not at issue in this case.

What I was according you was an opportunity to protect yourself on the record as to anything that would fortify you in argument on that principle point.

MR. MAHER: Your Honor, I don't think that the tender made for the purpose of proving good faith, even though Your Honor has ruled that that is out of the case, should render inadmissible those things which could prove some other defense.

**THE COURT:** I don't know what defense you want to prove.

**MR. MAHER:** Among other things, the lack of intent in the failure, and in the physical impossibility for Doctor Rumely.

**THE COURT:** I haven't passed on the physical impossibility you speak of, Mr. Maher. I think as to that feature you had better permit Doctor Rumely to  
170 take the stand and give counsel the opportunity to object when it seems necessary.

**MR. BURKINSHAW:** Just one supplemental feature, there.

I propose, if Your Honor so will permit me, to show, and on this subject of compliance, that this happened. The original subpoena which was exhibited carried a list of twenty-six itemizations, which list was dictated to Mrs. Pope, Doctor Rumely's secretary, and that list was complied with to the extent of turning over twenty-five out of the twenty-six items requested; that thereafter, on May 26, I propose to show that Mr. FitzGerald came back, and he had this subpoena likewise signed by Frank Buchanan, demanding production of these twenty-six items, that Doctor Rumely said, "Why do you want to serve this subpoena on me? You have got 95 per cent of the stuff claimed in this subpoena, I have given you people access to my files for a period of two weeks. You have gotten all of this." Whereupon FitzGerald, acting for the Committee, said, "In that event I will just serve the so-called short subpoena."

As I say, the matter of that long subpoena signed by Buchanan, then withdrawn, because compliance had been had with respect to twenty-five of twenty-six items has a very great bearing on this proposition of intent.

**THE COURT:** You have made your proffer there?

**MR. BURKINSHAW:** Yes.

**THE COURT:** And any argument you can base on that.

171 Is there any other proffer you want?

MR. BURKINSHAW: I don't think of any just now. Maybe during the course of this case I might have.

THE COURT: I haven't given you an opportunity to say anything with reference to this proffer. Have you anything to say?

MR. HITZ: We object to all of it as immaterial except such part as may have been raised at the hearings with regard to the possibility of compliance. I concede that that, if raised then, can be gone into now. I concede that if the question was raised then on impossibility to comply, it can be gone into now.

MR. BURKINSHAW: One further request. I should appreciate it very much if Your Honor, in view of what I said this morning, would take another look at the instructions forming the basis of the reversal in the Murdock case, 290 U. S. I don't want to be unduly persistent, but I still think it is the law of the land.

I would like to have Your Honor look at it.

172 MR. BURKINSHAW: I have got, Your Honor, character witnesses from New York, three from New York, as a matter of fact. They are eager to get back. It will just take a minute or two.

THE COURT: Do you have any objection?

MR. HITZ: No.

MR. BURKINSHAW: I will put them on, and get them away.

THE COURT: All right, sir.

MR. HITZ: Is this pertinency?

MR. BURKINSHAW: No, just character witnesses.

THE COURT: Character.

MR. BURKINSHAW: That is all, just character witnesses.

MR. HITZ: I think it is objectionable as not being material.

MR. BURKINSHAW: Character witnesses?

173 MR. HITZ: I certainly do.

THE COURT: I think we will hear them.

MR. BURKINSHAW: It is material in any case.

THE COURT: There is going to be a question of fact in this case?

MR. HITZ: If he testified to nothing in the case, then his veracity isn't in issue.

THE COURT: I am assuming you are proceeding in good faith.

MR. BURKINSHAW: I am going to ask them the reputation he has for respect for constitutional authority, which is directly in issue in this case.

MR. HITZ: I object.

THE COURT: I think that would be objectionable.

Are you going to have some testimony from Dr. Rumely?

MR. BURKINSHAW: Surely.

THE COURT: What Mr. Hitz is talking about is the question of character. If his credibility is thrown in for any purpose, I think that character would be proper.

MR. HITZ: I do, too, but he has to give material testimony.

THE COURT: He is going to,

. . . . .

174 MR. BURKINSHAW: At this stage of the record, I don't understand there has been any ruling as yet on the proffer I made before the luncheon recess. I don't want to offend by going into subjects that Your Honor thinks should be not considered by the jury.

THE COURT: You won't offend me, Mr. Burkinshaw, as far as that is concerned, but I don't want to interrupt you, because I think it has a bad effect insofar as the jury is concerned.

Specifically, I have held that the mere fact that he may have answered to other questions, or that he may have presented other evidence is immaterial to the issues presented in the three counts.

There is, however, still open the question as to whether



or not he on this record, and I am not familiar  
175 with the record, has shown any inability to  
physically comply.

I don't know what the record shows.

MR. MAHER: Page 174 of the record, Your Honor.  
It is in there.

THE COURT: In other words, if he before the Committee was making any showing it was a physical impossibility for him to comply with these particulars which we are now dealing with, I think you have a right to show it.

MR. BURKINSHAW: Yes.

THE COURT: What do you think?

MR. HITZ: I agree to that.

MR. BURKINSHAW: Now, with respect to the advice of trustees.

THE COURT: I did not hear.

MR. BURKINSHAW: Advice he sought and obtained from trustees.

THE COURT: Yes, not as to that, and similarly with advice of counsel.

MR. MAHER: For the purpose of a physical impossibility, would you permit us to show what he did in fact do in order to try to comply with the full subpoena?

MR. BURKINSHAW: What he did in fact try to do in his effort to comply with the entire subpoena.

THE COURT: You don't mean to contend he would have complied with it if—

176 MR. BURKINSHAW: No.

MR. MAHER: We say it was physically impossible to do it, anyway, regardless of what the intent was.

THE COURT: Whatever the record shows as to that background, I think you are entitled to show.

MR. MAHER: We have the situation, Your Honor, in this case, where he was asked for masses of documents. For a period of time his entire force was engaged

in producing the other documents, and had he attempted to comply fully with the subpoena he would have been months doing it. I think, on the question of physical impossibility, what these other people, his employees were actually doing to comply, is pertinent on that issue.

MR. BURKINSHAW: I think, also, the fact the investigators were in the office two weeks going through that stuff has a great bearing on the proposition.

THE COURT: Don't let us re-argue that. You are protected on that. As a matter of fact, he may have given them all he wanted them to have, and refused that which they wanted. I assume you are not going to contend he would have given them names, and addresses, of these categories with reference to \$1,000, \$500, or the name of the woman from Toledo.

MR. BURKINSHAW: No, I would not.

THE COURT: Then the physical part isn't  
177 material, is it?

MR. BURKINSHAW: I don't think it is immaterial, of course, but we have our record for that.

MR. LANDA: Just a minute. Assuming this man was asked to do an impossible thing, regardless of whether he intended to do it, or did not intend to do it, it would have no bearing whatsoever, if in fact he could not comply?

THE COURT: You mean he could sit idly by and say nothing, and then come in Court and say it was physically impossible?

MR. MAHER: No, I don't contend that.

MR. BURKINSHAW: His assistants worked forty-three and one-half hours.

THE COURT: I am not talking about that. I am talking about what we are doing here.

You ask him if it was physically impossible. Any objection, Mr. Hitz?

MR. HITZ: I think that is all right.

THE COURT: I think that will lead to another

question, would he have done it, in any event. That is not for me to pass on.

MR. BURKINSHAW: There is also this angle. There has been introduced by the government certain testimony with respect to the book "The Road Ahead." I propose to offer in evidence "The Road Ahead," the Norton 178 book on the Constitution, and these other books that were being sold.

THE COURT: Do you object to that?

MR. HITZ: I certainly do.

THE COURT: I will sustain the objection.

MR. BURKINSHAW: What is that, again?

MR. HITZ: I say I object to it.

MR. LANDA: They were testified to by the government.

THE COURT: I have sustained that. Let us don't debate them too long.

MR. BURKINSHAW: You are going to sustain the objection?

THE COURT: Yes.

MR. BURKINSHAW: I want to make that proffer.

THE COURT: You make the proffer of the books.

MR. BURKINSHAW: I make the proffer now of introducing in evidence The Road Ahead by John T. Flynn, particularly on the ground that the Court has permitted introduction of evidence purporting to discredit the aims and objects of that book.

My offer at this time of the book itself is to show precisely and permit the jury to judge for themselves just what this book purports to hold or preach.

I desire to offer in evidence the Norton Book on the Constitution, and other books, to show the character of the publications sold by this committee, and pre- 179 sumably referred to in the first and sixth counts of the indictment.

I propose to offer in evidence also an engrossed copy of the Bill of Rights which has been disseminated in

numbers totaling millions to schools, school children, intermediate schools and colleges throughout the United States as bearing on the functioning of this Committee for Constitutional Government under the corporate charter granted in the District of Columbia.

I propose generally to offer types of all books and literature published and disseminated by this Committee for Constitutional Government.

Now, I think my record is clear as to advice of counsel.

THE COURT: All right, sir. I think you are clear.

180 MR. BURKINSHAW: I just want to make this addition to that proffer as to advice of counsel.

I want to make proffer of testimony to show that when Dr. Rumely was confronted with the subpoenas and questions he sought, obtained and acted upon advice of counsel, who imparted to Dr. Rumely the holdings and opinions of the United States Supreme Court with respect to the right or authority of a congressional committee to make demand for the subject matters sought.

I propose to elicit testimony to show that Dr. Rumely sought the advice of former Senator Edward Moore, formerly a member of the Senate Judiciary Committee, and a member of the Board of Trustees of the Committee for Constitutional Government with respect to Dr. Rumely's rights, duties and privileges in the premises.

That in addition to Senator Moore he sought, obtained and acted on the advice of two other Members of the Board of Trustees, lawyers, to-wit, Sumner Gerard and Robert Dresser.

MR. HITZ: I understand Mr. Burkinshaw concedes that Mr. Rumely did not intend to and would not turn over to the committee the name of the lady in Toledo or the names of the contributors called for in the two subpoenas. If that be true, I think he has already stated himself out of the defense of impossibility.

MR. BURKINSHAW: I think with respect to 181 contributors, I think Dr. Rumely testified as to all contributors. I think we are a little bit in error there, that he refused to disclose the identity of quantity purchasers of books. I don't think he refused to disclose the identity of the contributors.

MR. HITZ: Do you claim he did disclose the identity of contributors?

MR. BURKINSHAW: I think he did, yes.

MR. HITZ: Did he give names?

MR. BURKINSHAW: Yes, and turned records over to the committee.

MR. HITZ: He didn't give the names in the committee hearings on the two different occasions?

MR. BURKINSHAW: I protested to that effect, remembering at all times this man is charged not with withholding identity of contributors or purchasers alone. There are three categories.

THE COURT: I am familiar with that.

MR. BURKINSHAW: I think it is incumbent on the Government to prove all three categories. In other words, this case can't ride to the jury on the proof of one.

MR. HITZ: Oh, yes.

MR. BURKINSHAW: No, it can't.

THE COURT: We will get to that when we get through with the case.

182 MR. HITZ: I think we are at the point where it hasn't been indicated in any way Mr. Rumely is going to testify to anything that is material under the rulings that the Court has given here.

THE COURT: If there is any question about that, we will withhold these other witnesses, and if and when it becomes material, then if you want to interrupt I will be glad to entertain it again, speaking of the character witnesses.



BY MR. BURKINSHAW:

Q On what date, Doctor, did you first appear before the Buchanan Committee? A I think June. Let me just refresh my recollection. June 6th.

Q Of 1950? A In 1950.

183 Q On how many occasions in all did you appear before the Buchanan Committee? A Four different times.

Q When were you served with the subpoena, the so-called May subpoena, the short subpoena? A When was I served with the subpoena?

Q Yes. A May 26, I think.

Q All right. Who served you? A I think Mr. Fitzgerald served that.

Q At or about the same time you were served with the subpoena which we call the short subpoena, the May subpoena, which is described in Part 1 of the indictment, were you shown another subpoena? A I was shown another subpoena with 26 demands. I said, "You have 95 per cent of what that subpoena asks for." He then withdrew that subpoena and said he would serve the short subpoena. We had already given him everything called for, expressed a willingness to give him everything called for.

THE COURT: Just a minute, Doctor. You better put a question, or we will get pretty far beyond what we are doing.

MR. BURKINSHAW: I just want to know about the long subpoena.

THE COURT: He has answered, and the short one, too.

MR. BURKINSHAW: I shan't press that matter further.

THE COURT: All right.

184 BY MR. BURKINSHAW:

Q In general, Doctor, what are the activities of the Committee for Constitutional Government?

MR. HITZ: I object.

THE COURT: What is the materiality of this?

MR. BURKINSHAW: Do you want to hear from me, Your Honor?

THE COURT: I will sustain the objection.

MR. BURKINSHAW: I beg your pardon?

THE COURT: I will sustain the objection.

MR. BURKINSHAW: May I be heard on that?

THE COURT: You may come to the bench.

MR. BURKINSHAW: I propose to show by the answer to the question propounded and to which objection was made that two-thirds of the activities of the Committee for Constitutional Government have to do with the publication and sale of books and other literature generally prepared in furtherance of the committee's general objective, that is, to support and uphold the Constitution of the United States.

I don't think the jury should be left in ignorance as to the activities of this committee.

THE COURT: You object?

MR. HITZ: I do.

185 THE COURT: I sustain the objection.

MR. BURKINSHAW: All right.

(Thereupon, counsel returned to the trial table and the following occurred within the hearing of the jury.)

BY MR. BURKINSHAW:

Q Now, on the occasion of the second subpoena, known as the August subpoena, are you able to tell us when that subpoena was served?

THE COURT: Did you get a subpoena in August, 1950?

THE WITNESS: We did, yes, sir.

THE COURT: And do you know what date that was?

THE WITNESS: That was August 22nd, I think.

BY MR. BURKINSHAW:

Q All right. And in response to that subpoena, did you appear before the Buchanan Committee? A I did.

Q And on what date? A On the 25th.

Q And have you a copy before you there of your testimony on the 25th? A My testimony, no.

Q For the purpose of refreshing your recollection, I should like to ask you if on that occasion of your appearance before the Buchanan Committee on Friday, August 25, 1950, you were asked—

186 MR. HITZ: Wait until I find the place.

MR. BURKINSHAW: Page 174.

MR. HITZ: Excuse me, Your Honor, I object to the form of the question, even so far as it has gone.

I think he is reading something to his own witness, to ask for a comment or an answer. I think it is already leading.

THE COURT: Suppose you put the question.

BY MR. BIRKINSHAW:

Q Will you tell what you said on the occasion you appeared before the investigating committee in response to that subpoena? Would a copy of the transcript as of that day serve to refresh your recollection as to what you said? A I think so, yes.

Q I hand you Volume 5 of the hearings of the Buchanan Committee and call your attention to page 174, and ask you if glancing over that will help you refresh your recollection as to what you said to the committee on that occasion with respect to the demands made upon you under that subpoena? A I said I had brought information on all the 25 points about which Mr. Buchanan telephoned. He had telephoned after serving the subpoena two days before, saying that he knew the subpoena called for more material than we could

187 supply in that short time, but that he wished especially to have information on 25 points. Mrs. Pope took down over the long distance the 25 points that

he wished information on. We supplied every item of information called for in those 25 points.

Q Can you tell us precisely what you said to the investigating committee on the occasion of your appearance? I now refer to that page. A I don't get that.

Q Look at that page and see if that serves to refresh your recollection as to what you told the committee that day? A "As far as it was physically possible."

Q Are you testifying now as to what you told the committee? A I told the committee I brought everything as far as it was physically possible. "But you asked for things that could not be produced in the course of months if we put six or eight people to work on it; so far as we physically could, I did, and I have got a statement outlining exactly the situation".

Q Now, did you for the purposes of your appearance before the committee on that occasion, prepare a statement with respect to that subpoena? A We did. We put the auditor to work. We made a transcript of the books answering every one of the questions 188 of the 25. We put the chief accountant and three assistants to work. They had asked for data on 43 months, and after about 45 hours of work they were able to cover only one month. But we photostated and brought that one month along, and I told the committee it would take ten weeks, and four or five people, and it would cost \$3,500 to complete the study for the whole period. The entries were scattered over 85,000 items. And we had to go back through thousands of sheets and pick out the information they asked for.

Q Now, Doctor, did you ask permission of the committee to insert that statement as part of your testimony on August 25? A My own statement to the committee at that time, I did, yes.

Q I now hand you Volume 5 of the volume of hearings, page 276, and ask you if this serves to refresh your recollection as to what you told the committee



with respect to compliance with the subpoena on that date? A It does.

Q All right. Now, will you tell his Honor and the ladies and gentlemen of the jury what you stated on that occasion? A "Chairman Buchanan—"

MR. HITZ: Doctor, excuse me, please. I object to it as being immaterial for the reason it states at the top of that statement on 276 as follows: "A statement released to the press after Dr. Rumely's appearance on the stand before the House Select Committee on Lobbying Activities, August 25, 1950."

Therefore, this statement given to the press afterward is not a statement made in objection to the rights of the committee to obtain the information.

MR. BURKINSHAW: The fact it was released to the press afterwards does not serve in any wise to abate the fact that it was offered and received by the committee in open hearing; by the committee as part of the testimony of Dr. Rumely.

THE COURT: When was it received?

MR. BURKINSHAW: That day, August 25.

MR. HITZ: It would have to be shown to be before he concluded his testimony.

THE WITNESS: The statement before shows it was concluded, by Mr. Doyle:

"I would say to you, Mr. Chairman, in view of Mr. Rumely's statement, it is very important that it go in our record, and that Congress know it, and that all the people in America have a chance to read it, whatever it is."

THE COURT: What is the time of this?

MR. BURKINSHAW: I beg your pardon?

THE COURT: What is the time, do you know?

MR. BURKINSHAW: No, I don't.

THE COURT: If you don't know, and I don't know, let us see if he knows.



Had you completed your appearance before the committee?

THE WITNESS: No, I had not. I was still before the committee.

THE COURT: On the same day, sir?

THE WITNESS: On the same day, and the chairman said: "Without objection the entire statement will be put in the record at this point."

THE COURT: That was on the same occasion?

THE WITNESS: Yes, same occasion, while I was on the stand.

MR. HITZ: Yes, but, Your Honor, the only thing that happened after this was the chairman adjourned the session. Page 279, is the very next thing the committee did.

MR. BURKINSHAW: I suggest probably the best proof of the fact that it was accepted as part of Dr. Rumely's testimony resides in the fact it is incorporated in this record gotten up under the direction of Chairman Buchanan.

MR. HITZ: But the Doctor's refusal to produce papers and to testify had already been committed.

THE COURT: Already what?

MR. BURKINSHAW: This is the reason he showed why he could not comply fully with that subpoena.

THE COURT: Let me read what we have.

MR. BURKINSHAW: Mr. Maher suggests we have a stipulation here as to the accuracy of this transcript as being an accurate record of the proceedings. If it is accurate for Mr. Hitz's purposes, I suggest it is accurate for ours.

THE COURT: Suppose you come to the bench and indicate to me what you want to use it for.

MR. BURKINSHAW: Your Honor will note, just prior to that statement, look at the sentence above that:

"Without objection the entire statement will be put in the record at this point."

THE COURT: Yes. Then I note here you have marked something which he has already testified to.

MR. BURKINSHAW: I suppose you are using my copy there.

THE COURT: Yes.

MR. BURKINSHAW: The fact on two occasions he testified to the same thing wouldn't necessarily mean he was limited to proof of only one of those statements.

THE COURT: No, what I am saying is if this is what you want, he has already testified to it.

MR. BURKINSHAW: But not in full.

THE COURT: Oh, well, we are not going to 192 take every dot of an "i".

MR. BURKINSHAW: No.

THE COURT: What is it you want he hasn't testified to?

MR. BURKINSHAW: We want this. We can knock out the first two paragraphs. I don't care about those.

THE COURT: All right, sir.

MR. BURKINSHAW: Now, this third paragraph.

THE COURT: Don't talk so loud, or there won't be any sense in coming up here.

MR. BURKINSHAW: All right. No point in coming up.

Now, look at that third paragraph:

"We were asked, within 2 and  $\frac{1}{2}$  days to produce copies of all checks issued during 37 months. Although we immediately put a chief accountant and four assistants on the job, it required 43 and  $\frac{1}{2}$  working hours to make the photostats including one month's checks. Covering 37 months would require continuous work, including overtime, four or five or six weeks and involve heavy expenditure.

"We were told that a similar subpoena by you upon one of our banks for copies of all checks involved would require the time of ten clerks for one year."

Then, the next paragraph is strictly in point. On the next page, 277.

THE COURT: 'Practically all of that is already in. He has already testified as to that.

193 What is the other part?

MR. BURKINSHAW: I don't think he has testified:

"The original records covering receipts are scattered through 5,000 or more sheets, each the size of a newspaper page and bearing 18 or 20 names and addresses".

This is just a fuller statement of the physical inability on the part of the witness to get all this stuff together.

Over on the next page, 277, the fourth paragraph, it says:

"Items (a) and (b) in the subpoena are physically impossible to comply with in a period of 2 and 1/2 days, or even 2 and 1/2 months."

THE COURT: Then he goes on and says he has already done that, doesn't he? I think he says: "However, he dictated a statement as to the items turned up in the bank accounts in which the committee was particularly interested in this hearing, and about which it wished complete information."

MR. BURKINSHAW: I submit he is entitled to read the entire statement as bearing on the proposition of noncompliance. After all, the man is being charged here with wilful default. Whether he has done a thing intentionally or not certainly can be cleared.

194 THE COURT: You mark the ones you want to read, and let me read them.

Let him see them, Mr. Burkinshaw, and then I will read them.

MR. HITZ: We don't object to what is marked on 277, and we don't object to it being read by Dr. Rumely.

MR. BURKINSHAW: I might point out that there is an appendix to that, Your Honor, runs into two or three pages, containing all this other data. Immediately

following that is this appendix giving full facts and figures there following this, this part of it.

THE COURT: What objection have you got to the paragraph that starts with "Your subpoena asks for." Any objection to that?

MR. HITZ: I didn't hear the first of what you said.

THE COURT: On page 276, when it says "Your subpoena asks for."

MR. HITZ: I think that was covered already in his oral statement, in effect.

THE COURT: Well, if it is duplication, he doesn't remember it.

What about the next one?

MR. HITZ: I think he has testified to the next paragraph.

THE COURT: Well, it is duplication, maybe.

MR. BURKINSHAW: You say there is duplication in that paragraph which starts "Your subpoena"? That hasn't been touched on.

THE COURT: Then, as to the other one, "I am willing to produce," have you any objection to that?

MR. HITZ: I think it is simpler not to object to from "Your subpoena," down to the end of the quotation near the bottom, and I do not object to the three paragraphs marked on 277.

THE COURT: So, then, the only thing that is out, now, is what you had before, Mr. Burkinshaw, I think, and that is the paragraph "You have discovered no—"

MR. BURKINSHAW: Let me see. How about this paragraph starting with "Your subpoena."

THE COURT: That is right. That is going to be read.

MR. BURKINSHAW: That will be read.

THE COURT: Here it is, and this over here, then.

MR. HITZ: In view of the fact I have indicated no objection to this, does that satisfy Mr. Burkinshaw with respect to parts that I have not agreed to?

THE COURT: There isn't anything you haven't agreed to, now, is there, that isn't duplication?

MR. HITZ: That is quite true. I agree with that.

THE COURT: I think that is the substance of it, isn't it, Mr. Burkinshaw? Let me ask you this. Isn't it easier for you to read it than ask him?

196 MR. BURKINSHAW: Easier me reading it?

Yes, surely.

THE COURT: You haven't any objection?

MR. HITZ: That is agreeable.

THE COURT: It will save time.

(Thereupon, counsel returned to the trial table and the following occurred within the hearing of the jury.)

MR. BURKINSHAW: It has been suggested by the Court with respect to those portions of Dr. Rumley's statement of May 25 that it might be easier for myself to read to the jury the portions that we regard as being pertinent.

This is a statement permitted to be introduced as part of the record on the occasion of Dr. Rumley's appearance on August 25 in reply to a subpoena.

The statement itself is long. I am just going to read a few paragraphs:

"Your subpoena asks for the name of each person from whom a total of \$500 or more has been received for any purpose during the period of January 1, 1947, to August 1, 1950, and full information as to the purpose of such payment, and all correspondence relating thereto. The original records covering receipts are scattered through 5,000 or more sheets, each the size of a newspaper page and bearing 18 or 20 names and addresses. Since many individuals bought or gave annually, some  
197 more than once a year, to go back to original records and checks for the information you ask for would necessitate covering approximately 100,000 items.

"If we put on and trained, four or five skilled workers—as many as we could accommodate in our crowded



office, it would require a period of 15 weeks, and a cost of approximately \$3,500, a cost which would have to be provided."

Then, skipping some material which is not desired as being pertinent to the issues set up by this indictment, I skip over two pages to page 277.

MR. HITZ: Excuse me, Mr. Burkinshaw. I thought he was going to continue reading there. That was the understanding at the bench.

THE COURT: I thought you were going to read through, too.

MR. BURKINSHAW: I will go ahead.

THE COURT: All right.

MR. BURKINSHAW: (Reading):

"The overwhelming majority of our income arises from the sale of books and literature and such services as Paul Revere messages, sold at \$10 per year. In my testimony, on June 6, page 43, I said:"

Remember, this is Dr. Rumely at all times talking.

"I am willing to produce the records of all 198 contributions of \$1,000 or more within the period designated; I am willing to produce the records of all those within the period designated, except a few that related to the promotion of The Road Ahead and advertising Fighters For Freedom, which has nothing to do with lobbying. I am not going to produce the names of people who bought books because, under the Bill of Rights, that is beyond the power of your committee to investigate."

"And, in the Rumely statement to the Buchanan Committee, which was accepted and made part of your record on the same day, in concluding, I stated:" You want me to go right ahead?

MR. HITZ: No, I think the other part we agreed upon is further down.

MR. BURKINSHAW: All right.

THE COURT: "Items (a) and (b)," I thought was the next place you marked.

MR. BURKINSHAW: Where it is marked "Items (a) and (b)?"

MR. HITZ: That is right.

MR. BURKINSHAW: Going on, Dr. Rumely says: "Items (a) and (b) in the subpoena are physically impossible to comply with in a period of 2 and 1/2 days, or even 2 and 1/2 months. In a telephone talk, Chairman Buchanan stated that he hardly expected compliance with these items of the subpoena, because we had already taken the stand that we would not reveal the names of the purchasers of our books, and/or literature. However, he dictated a statement as to the items turned up in the bank accounts in which the committee was particularly interested in this hearing, and about which it wished complete information.

"There were 25 items in all. It is with real satisfaction that I bring you complete information on each single item. And, when you have the facts, you will realize how completely unfounded was the statement that any information due to be reported was withheld.

"Some of the information was already specifically before you in my previous testimony of June 6th. All the information that you asked for in the checks of the committee is covered in detail in the quarterly lobbying reports on file here in Washington and certainly accessible to your committee."

May we approach the bench again, your Honor?

(Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

MR. BURKINSHAW: Have you got your record there? Suppose you take the one I am using.

THE COURT: Yes.

MR. BURKINSHAW: At page 231, at the top of the page.

THE COURT: At the very top?

200 MR. BURKINSHAW: At the top, yes. Read down just about seven or eight lines. Mr. Brown says:

"Have you made an honest effort to comply?" He says: "We worked the people overtime until 8 or 9 o'clock at night."

THE COURT: What is he talking about there? What does this relate to?

MR. BURKINSHAW: This relates to the subpoena of August, where Dr. Rumely testified he made an honest effort to comply.

THE COURT: I haven't read it. I don't know its context. Have you any objection to it?

MR. HITZ: I have told Mr. Burkinshaw I thought it came within your ruling. I am inclined to think it is admissible.

THE COURT: I don't know the context.

MR. BURKINSHAW: I think you can take my assurance on that. In the interest of time, I will just read that section, if the Court please.

201 THE COURT: Yes.

MR. BURKINSHAW: Now, another section of Doctor Rumely's testimony on August 25.

Mr. FitzGerald, the gentleman who was on the stand this morning.

"Mr. FitzGerald. Have you brought each of the returned checks drawn on the committee 'deposit account C'?"

"Mr. Rumely. We put in four men to work on it, and it took 43-1/2 hours.

"Mr. FitzGerald. Have you brought them?"

"Mr. Rumely. For 1 month. I have got a statement here that will explain the situation, and that you ask an impossible thing.

"Mr. FitzGerald, By 'return check,' Doctor—

"Mr. Brown. Have you made an honest endeavor to comply?

"Mr. Rumely. We worked for two and a half days; We worked the people overtime until 8 or 9 o'clock at night.

"Mr. Brown. Just answer my question: Have you made an honest effort to comply?

"Mr. Rumely. Yes.

"Mr. FitzGerald. By 'return check' I mean, Doctor, a check that was drawn on the account delivered to another person, and then returned to your bank and charged to your account after having been deposited by the payee or some endorser; you understand that?

"Mr. Rumely. I have one month here, and you are asking for 37 months, and it took us 43-1/2 hours and four people.

"Mr. FitzGerald. And you have one month here?

"Mr. Rumely. Yes.

"Mr. FitzGerald. But you have neglected to bring the rest?

"Mr. Rumely. I have not neglected.

"Mr. FitzGerald. You have neglected to bring the other months?

"Mr. Rumely. You ask an impossible thing.

"Mr. FitzGerald. The answer is that you have not brought them because it is an impossibility?

"Mr. Rumely. You ask an impossibility.

"The Chairman. Aren't these the same things we asked for at the previous hearing in June, Doctor?

"Mr. Rumely. No; they are not the same things.

"The Chairman. In general, are they not the same? In general, are they not the same?

"Mr. Rumely. No; these checks were never asked for before.

203 "The Chairman. Well, we asked for your complete financial record, which would include these checks, and you did not submit them to the committee at that time, June 27, 28, or 29?

"Mr. Rumely. There was no indication that you wanted the canceled checks.

"The Chairman. You have a complete list of what we asked for.

"Mr. Rumely. Yes."

MR. HITZ: Your Honor, I wasn't fully acquainted with that passage, or I think I would not have consented for it to go in, because I think it is immaterial, for we don't charge the failure to produce any facts whatever. Therefore, I would like permission now to object to it, and by way of a remedy to ask that it be stricken, if I may.

MR. BURKINSHAW: May I be heard, if the Court please?

THE COURT: Yes.

MR. BURKINSHAW: I strongly submit, if the Court please, it is highly material, because here from the lips of the very witness himself, is testimony showing that he made every effort to comply with the demands of the committee. He told about working people overtime until eight or nine o'clock at night. He told about making an honest effort to comply. I say that it is highly material and highly relevant as bearing on the proposition of wilful refusal as charged in the indictment to comply with the demands of the Committee. I think it should stand.  
strike.

204 THE COURT: I will consider it as a motion to strike. I will keep it as pending on a motion to strike.

MR. HITZ: You mean your decision will be reserved.

THE COURT: I will pass on a motion to strike.

MR. HITZ: And I make that motion.

THE COURT: All right.



MR. HITZ: I understand the ruling on that is reserved?

THE COURT: That is right, sir. I am treating your motion as a motion to strike.

BY MR. BURKINSHAW:

Q When was this August subpoena served on you, Doctor?

A This last one?

Q Yes. A On the twenty-second of August.

Q What time of the day? A About 5:00 o'clock, 4:30 or 5:00 o'clock.

Q Where was that served? A In the offices of the Committee.

Q The twenty-second of August? A That is 205 E. 42nd Street.

Q You were ordered to appear at 10:30 on the morning of the twenty-fifth, is that right? A That is right.

205 Q How many work days did that give you to go through your records and dig out the stuff demanded by this subpoena? A Two days.

Q Did you put some people to work on that? A I immediately put people to work, that evening.

Q Whom did you put to work on it? A I put Mr. Hermes, and I told Miss Himsworth to get busy and help.

Q Did the people assigned to that task actually work on the evening of the twenty-seventh? A They did, a few hours.

Q With regards to the twenty-third, what, if any, work was done? A They worked the whole day. They worked after hours until late in the evening, I think 9:00 o'clock.

Q How about the twenty-fourth? A The twenty-fourth?

Q The twenty-fourth. A The same thing on the twenty-fourth. I had to take the data with me in the

evening, and they did finish everything they could, and gave me one month's report, the most they could finish within that period, 43 hours and a half of time put on it.

Q What position in your organization is occupied by Mrs. Himsworth? A Miss Himsworth is the chief auditor and accountant or bursar. She handles cash, and she handles the books.

Q On the occasion you were served with this subpoena on the twenty-second, was that the only subpoena you were shown? A I was shown the long subpoena, but served the short one.

Q Did you look at the long subpoena? A I did.

Q Was that signed by Chairman Frank Buchanan? A It was signed by Chairman Buchanan.

Q Was that long subpoena actually served on you? A That was handed to me, and then when I said 95 per cent of all it called for "you have already had voluntarily from us," and then he said, "well, I will take that back and I will serve the short subpoena."

207 Q So your answer is, Doctor, as I understand it, that the so-called long subpoena was not served on you? A The so-called long subpoena was not served, but it was dictated when they first came to the office, and it was shown to my attorney.

THE COURT: I don't think we need all this, do we, Mr. Burkinshaw?

You did get the short subpoena?

THE WITNESS: He gave me the short subpoena.

THE COURT: And that is what you came in obedience to, is that right?

THE WITNESS: Yes, sir.

BY MR. BURKINSHAW:

Q Have you got the copy of the long subpoena that was served on you that day? A I have the transcript that was dictated to Mrs. Pope, but I haven't the copy of the long subpoena.

Q Would the transcript serve to refresh your recollection as to what the long subpoena sought? Would that transcript serve to refresh your recollection as to what was sought in the long subpoena? A Oh, yes.

MR. BURKINSHAW: Have you that transcript, Mrs. Pope?

THE COURT: What difference does that make, Mr. Burkinshaw? We are hearing the question as to  
208 whether there has been compliance with the short one.

MR. BURKINSHAW: I think it makes this difference.

THE COURT: Let me ask this question. He is charged with the violation of the short one, isn't he?

MR. BURKINSHAW: That is right.

THE COURT: Do you object?

MR. HITZ: I do object.

THE COURT: I will sustain the objection, because that is not in issue.

MR. BURKINSHAW: But may it be considered I have made my proffer with regard to the long subpoena and the contents thereof?

THE COURT: Yes, certainly.

MR. BURKINSHAW: You remember, Your Honor, about some people who I told you were here from out of the city?

THE COURT: Yes, I think at this time you can do that.

Doctor, will you step down, to allow us to convenience some people called to testify for you.

(Witness temporarily excused.)

Whereupon

*Albert W. Hawkes*

*Direct Examination*

209

BY MR. BURKINSHAW:

Q Your full name, Senator. A Albert W. Hawkes.

Q Former United States Senator from the State of New Jersey? A 1943 to 1949.

Q Have you held other public offices in the United States Government, sir? A I was appointed to the National War Labor Board in 1943 when it was organized by President Franklin D. Roosevelt.

Q And have you ever held any office with respect to the Chamber of Commerce of the United States. A I was President of the United States Chamber of Commerce in 1941 and 1942.

Q Do you know the defendant in this case, Dr. Edward A. Rumely? A I know him very well.

Q How long have you known him, sir? A I have known him about — I have known him 10 years. Just about 10 years.

Q Do you know where he lives? A He lives in the city of New York.

210 Q Do you know other people in New York who know him? A Do I know people that know him? Yes, I know a great many people.

Q Do you know what his reputation is among those people in New York who know him, in reference to truth and veracity? A I would say his reputation for truth and veracity and good Americanism is about as good as anyone I know.

MR. BURKINSHAW: You may cross examine.

MR. HITZ: I object to "good Americanism", and ask that it be stricken.

THE WITNESS: I beg your pardon.

THE COURT: That is all right, sir. You have no objection to its being stricken?

MR. BURKINSHAW: Now, if the Court please, I understand I have made my proffer with respect to—

THE COURT: Are we through with Senator Hawkes?

MR. MAHER: No.

MR. BURKINSHAW: I beg your pardon.

THE COURT: Are you through with him as a character witness?

MR. BURKINSHAW: Just one thing. May we come to the bench?

211. MR. BURKINSHAW: I should like to make a proffer here on the questions to be asked Senator Hawkes as to the reputation of the defendant, as to his respect for constitutional authority, an issue which I submit is involved in this case.

THE COURT: I assume you object?

MR. HITZ: I object.

THE COURT: I sustain the objection.

MR. BURKINSHAW: That is all. I understood you were going to do that. I wanted to make sure on my record.

Certainly I would be entitled to ask his reputation as to being a law abiding citizen.

THE COURT: I don't think that is in issue. You object to it?

MR. HITZ: I object to it.

THE COURT: Yes, I don't think that is in issue.

MR. HITZ: I have no questions of Senator Hawkes. (Witness excused.)

MR. BURKINSHAW: Is Mrs. Amos Pinchot in the court room?



212      Whereupon

*Mrs. Amos Pinchot*

*Direct Examination*

BY MR. BURKINSHAW:

Q Your full name is Mrs. Amos Pinchot? A Yes, sir.

Q And that is spelled P-i-n-c-h-o-t? A That is right.

Q And you are the widow of Amos Pinchot? A Yes, sir.

Q Do you know the defendant in this case, Dr. Edward A. Rumely? A Very well.

Q How long have you known him, Mrs. Pinchot? A More than 20 years.

Q Do you know where he lives? A He lives in the Hotel Adams, in New York City.

Q Do you know other people in New York City who know him? A Lots of them.

Q Do you know what reputation Dr. Rumely bears with those people in New York who know him, that is, what reputation he bears as to truth and veracity?

213 A It is of the highest.

MR. BURKINSHAW: You may cross-examine.

MR. HITZ: No examination of Mrs. Pinchot, thank you.

(Witness excused.)

MR. BURKINSHAW: Mr. Williamson.

Whereupon

*Samuel T. Williamson*

*Direct Examination*

BY MR. BURKINSHAW:

Q Your full name, Mr. Williamson. A Samuel T. Williamson.

Q Where do you reside? A Rockport, Massachusetts.

Q What is your occupation, sir? A My occupation is that of a writer and editorial adviser.

Q Have you occupied sundry editorial positions in the course of your career? A Yes, sir.

Q And will you kindly enumerate the more outstanding of these, please? A I was a correspondent of the New York Times in Washington for a number of years.

214 Q How many years? A In Washington for about four years. I was with the New York Times, with the exception of war service, 16 years.

Q Yes. A Later I was the co-founder of Newsweek Magazine and its editor in chief for 5 years.

My only Government service outside of World War I was as chief of overseas publications in the Office of War Information.

Q And did you work with the Office of War Information, better known as OWI during the war years? A Yes, sir.

Q Do you know the defendant in this case, Dr. Edward A. Rumely? A Yes, sir, I do.

Q Do you know where he lives? A I do.

Q Where does he live? A At 2 East 86th Street, New York City.

Q How long have you known Dr. Rumely? A I have known Dr. Rumely for 13 years.

Q Do you know other people in New York City who know Dr. Rumely? A I beg pardon? In New York City?

215 Q Yes. A Yes, I do, all sorts and conditions of people.

Q Do you know the reputation Dr. Rumely bears among those people, what reputation for truth and veracity? A From my observation—

THE COURT: No, sir, it is not your observation. It is what his reputation is.

THE WITNESS: His reputation for truth and veracity is of the highest.

MR. BURKINSHAW: Thank you. You may cross examine.

MR. HITZ: No questions on Mr. Williamson.

MR. BURKINSHAW: I believe that is all.

(Witness excused.)

MR. BURKINSHAW: Dr. Rumely, will you go back on the stand, please?

*Edward A. Rumely*

*Direct Examination*

BY MR. BURKINSHAW:

Q Now, Doctor, it has been testified that after the Lobbying Act became law on August 2, 1946, you registered? A We registered as lobbyists.

Q Yes. Was that a complete registration, or it is true, as has been testified here, that you registered under protest? A We registered under protest, because we did not think we were—

MR. HITZ: Excuse me. I object to the reasons.

THE COURT: Yes.

BY MR. BURKINSHAW:

Q How did you make known your protest, doctor? A We wrote a letter.

MR. BURKINSHAW: I will ask the reporter to mark this for identification as Defendant's Exhibit No. 1.

(A document was marked for identification as Defendant's Exhibit No. 1.)

BY MR. BURKINSHAW:

Q I hand you a carbon copy of a paper writing which has been marked for identification as Defendant's Exhibit No. 1 and ask you if you can identify that? A Yes.

Q. What is that? A. That is—

MR. HITZ: Excuse me. I object. He hasn't offered it yet.

THE COURT: Do you object to the receipt?

MR. HITZ: I object to the question because it has not been offered, and Mr. Rumely was about to say what it is.

MR. BURKINSHAW: I asked if he could identify it. I simply asked for a yes or no answer.

THE COURT: He said Yes.

BY MR. BURKINSHAW:

Q. As what?

MR. HITZ: I object. Doctor Rumely, please let me have an opportunity to object, and I do object.

THE COURT: It will speak for itself. Do you desire to offer that?

MR. BURKINSHAW: I do offer it.

THE COURT: Any objection?

MR. HITZ: I do object. It is immaterial.

MR. BURKINSHAW: Do you want to see it, your Honor?

THE COURT: I will sustain the objection.

MR. BURKINSHAW: As part of the Government's case in chief there are two elements to be considered. One is the Government brought out the fact that he was registered under a protest. Next, the Government argued to you on behalf of pertinency that his very registration indicated he was engaged in lobbying.

I can't see for the life of me what could be any more pertinent as to the fact of his registration than this letter which was headed "Under Protest."

THE COURT: Have you seen it?

MR. HITZ: I have seen it. I won't object to its being considered by the Court and received in evidence for the limited purpose of pertinency. I think it is immaterial to the jury's question. It relates only to pertinency.

MR. BURKINSHAW: The entire statement runs to the question of his activity as a lobbyist, but it has been argued by the Government in the case the main thing is the fact of his registration. I say we have an absolute right to show the protest.

THE COURT: I don't think that is for the jury to pass on. I have to pass upon that as a matter of law.

MR. BURKINSHAW: Here is the thing. It will be argued by the Government that the very fact of his registration brings him, according to the Government—

THE COURT: He is not going to argue pertinency to the jury.

MR. HITZ: No.

MR. BURKINSHAW: I know, but on the subject of whether he was engaged in the lobbying activities, he is going to say this man registered as a lobbyist. As I say, he put that in as part of his case in chief. Then he argues to your Honor the very fact there was registration—

THE COURT: You have offered it for the purpose of presenting it to the jury. I deny it.

MR. BURKINSHAW: I make my offer on the grounds assigned.

Will you let me take that one letter, please?

219 THE COURT: I think the record ought to show that the Court has read the letter.

MR. BURKINSHAW: If the Clerk will mark this for identification as Defendant's Exhibit No. 2, I want to make an offer with respect to that.

THE COURT: Whom is that to?

MR. BURKINSHAW: That is the correspondence relating to the registration. I want to make an offer on that and get a ruling on it.

THE COURT: I will deny this and indicate I have read it.

MR. BURKINSHAW: Mark it for identification No. 2. (The document referred to was marked for identification as Defendant's Exhibit No. 2).



MR. HITZ: May I ask a question? Were both of those admitted for the limited purpose? I think they should be.

THE COURT: That is correct. I sustained the objection as far as its being presented to the jury is concerned.

MR. BURKINSHAW: Your Honor will consider it as bearing on the question of pertinency? That is, you received it for the limited purpose of passing on the law question as to pertinency, and refused it for presentation to the jury.

THE COURT: Presentation to the jury.

MR. HITZ: The objection of the Government is to either one for that purpose.

220 THE COURT: That is right.

MR. BURKINSHAW: Now, if the Court please, mark this Defendant's Exhibit No. 3 for identification?

(A document was marked Defendant's Exhibit No. 3 for identification.)

221 THE COURT: Mr. Burkinshaw, your witness said that he would like to change one statement made, that he was before the Committee five times instead of four times. Would you like that to be treated as his answer?

MR. BURKINSHAW: Yes.

THE COURT: You will understand the correction, ladies and gentlemen, by the witness.

BY MR. BURKINSHAW:

Q That is, Dr. Rumely, you wish to change your testimony so as to testify that you were before the Committee in all, five times instead of four times? A Five times; twice under subpoena and three times voluntarily.

MR. BURKINSHAW: Now, if the Court please, I offer this for identification as Defendant's Exhibit No. 3. Mr. Hitz has seen it.

MR. HITZ: I think the document is self-explanatory. We object to it as immaterial, because it is dated April, 1951, therefore after the offense alleged in the indictment.

THE COURT: I will sustain the objection.

MR. BURKINSHAW: Now I have a further document of the same tenor, which I want to have marked for identification as Defendant's Exhibit No. 4.

THE COURT: What is the date of that, Mr. Burkshaw?

MR. BURKINSHAW: January, 1950.

222 THE COURT: Have you seen this, Mr. Hitz?

MR. HITZ: No, I have not.

MR. BURKINSHAW: Look it over (handing exhibit to counsel for the Government.)

(Quarterly report of person registering under lobbying act, dated January 9, 1950, was marked Defendant's Exhibit No. 4 for identification.)

MR. BURKINSHAW: I now offer that, if the Court please.

MR. HITZ: We object to it as apparently being a file copy of Dr. Rumely. There is no evidence here that the original of that was ever filed with the House of Representatives. For that reason we feel it could be objectionable.

MR. BURKINSHAW: Let me take care of that to this point. May the witness have that document for a moment?

BY MR. BURKINSHAW:

Q Dr. Rumely, can you tell us what happened to the original of that document? A It was sent to the Clerk of the House of Representatives.

Q Did you receive an acknowledgment? A We did.

MR. BURKINSHAW: I now renew the offer, if the Court please.

MR. HITZ: Our objection now is only that it does not apply to any jury question. We have no objection 223 to it on the matter of pertinency that the other documents were received upon.

MR. BURKINSHAW: You will remember, if the Court please, this was part of the Government's case in chief.

THE COURT: I don't think you should argue it now.

MR. BURKINSHAW: All right, I shan't.

THE COURT: I will receive it in the same sense that Exhibits No. 2 and 1 were heretofore received.

(The document heretofore marked for identification was received in evidence as Defendant's Exhibit No. 4.)

MR. BURKINSHAW: Mr. Clerk, will you kindly mark this for identification as defendant's Exhibit No. 5? No. 5 is a letter that accompanied it.

(Carbon of letter dated January 9, 1950, addressed to Clerk, House of Representatives, from Edward A. Rumely, was marked for identification as Defendant's Exhibit No. 5.)

BY MR. BURKINSHAW:

Q. I hand you a paper writing entitled Defendant's Exhibit for identification No. 5, and ask you if you recognize it? A. I do.

Q. As what? A. As a letter that I sent with the report.

Q. Accompanying the report? A. Yes.

224 MR. BURKINSHAW: I now make offer of the letter that accompanied that report, if the Court please.

MR. HITZ: No objection for receiving it as the other documents were.

MR. BURKINSHAW: I make an offer generally, if the Court please, and not alone for the restricted purpose suggested by Mr. Hitz.

THE COURT: I will receive it in the same form that the Exhibits 4, 2, and 1 were received. So that the record will be complete, Mr. Burkinshaw, that will mean it is not received generally.

MR. BURKINSHAW: It is not received generally, but it is received for the restricted purpose your Honor indicated at the bench, yes.

(The letter heretofore marked for identification was received in evidence as Defendant's Exhibit No. 5.)

BY MR. BURKINSHAW:

Q I now hand you another paper writing marked for identification Defendant's Exhibit No. 6, and ask you to identify that. A Yes, that is the acknowledgment we received from the Clerk.

MR. BURKINSHAW: I now offer this generally, if the Court please, and not alone for the restricted purpose.

MR. HITZ: We have no objection for the limited purpose.

225 THE COURT: It will be denied for the general purpose, and received for the specific purpose stated.

(Letter dated January 10, 1950, from Clerk of House of Representatives to Edward A. Rumely was marked and received in evidence as Defendant's Exhibit No. 6.)

BY MR. BURKINSHAW:

Q Now, on the occasion of the May visit to your offices by Mr. Little and his colleagues, was Mr. FitzGerald there during that period? A I don't think he was there the first time. I think he came later on.

Q And how long were these representatives of the Buchanan Committee in your offices? A About two and a half weeks. One or two were there up to a three-week period.

Q Did you provide these representatives of the Buchanan Committee with photostats of your record?

MR. HITZ: I object as immaterial.

THE COURT: Will you read the question, please?

THE REPORTER: (Reading):

"Q Did you provide these representatives of the Buchanan Committee with photostats of your record?"

THE COURT: What makes it relevant?

MR. BURKINSHAW: I offer it, may your Honor please, for two reasons: One, to show compliance  
226 with the demand of the Committee by turning over to the Committee's agents—

MR. HITZ: I am sorry, your Honor; I don't think argument of this type should be made in front of the jury.

MR. BURKINSHAW: All right; let's go to the bench, then.

(Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

THE COURT: First of all, Mr. Burkinshaw, I don't think you are contending that he was in compliance, are you?

MR. BURKINSHAW: Not a complete compliance, no.

THE COURT: Well, you give the wrong impression when you say "compliance." It wasn't compliance.

MR. BURKINSHAW: I want to show that with respect to the so-called long subpoena, which was exhibited but not served, that 95 percent of the stuff shown, everything that was turned over, was photostated by Dr. Rumely's organization and turned over to these people, and now appears in a couple of hundred pages of fine print in the printed record.

I think that has a very definite bearing on whether or not there was wilful default, as charged in the indictment. I think it has a very great bearing on whether he intentionally was refusing compliance; and again, as your Honor will remember, these subpoenas call not for one item but three or more items, each one; and it is incumbent upon the Government to prove that not some but that all the items set up in the indictment are shown to have been denied.

227 In other words, I don't think the Government can come in here and prove—it is not in the disjunctive; it is in the conjunctive. Unless the Government proves—

THE COURT: Unless the Government proves everything is refused?



MR. BURKINSHAW: Unless the Government proves that the letter of that count is followed absolutely then I say I am entitled to a directed verdict because he has to prove all three of those things, and if he can show that the Government has charged that he refused data as to the contributions, and as a matter of fact he turned over all the data, I say it is not material and will show that the Government has not made out its case as alleged in the indictment.

THE COURT: You mean to say if it can be shown as a fact that he didn't give some of these documents that would not be sufficient?

MR. BURKINSHAW: Absolutely I do.

THE COURT: And that is the reason you want this in?

MR. BURKINSHAW: Yes.

THE COURT: On that basis I will deny it.

MR. BURKINSHAW: For instance, in this indictment they want the name and address of each person from whom a total of \$1,000 or more has been received by the Committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to  
228 (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans."

I say this, that if Dr. Rumely has turned over all information with respect to contributions I think he has a right to show it.

THE COURT: What is that?

MR. BURKINSHAW: I think if he has turned over to these people all data pertaining to contributions I say he has an absolute right to show that as a part of his defense.

THE COURT: I don't think it is material to this issue.

MR. BURKINSHAW: It charges receipts from the sale of books, loans, and contributions. Now, if he can show he reported these contributions, either there or before the Committee, or he showed these loans, I think he has a right to prove those.

THE COURT: The sole issue is going to be related to this one proposition, isn't it, namely, the refusal to give the names and addresses of people, and that is all he is going to argue, and he has a right to argue.

MR. HITZ: Right.

MR. BURKINSHAW: In other words, does your Honor hold as a matter of law that if the indictment charges that he withheld information as to persons, and withheld information with respect to contributions and with respect to loans that the Government has still  
229 made out a case even if it only proved the first element and not the others?

THE COURT: I am not following you. As I understand the specific charge is going to be that he failed to give the names and addresses of each person from whom a total of \$1,000 or more had been received by the Committee during the specific period.

MR. BURKINSHAW: Well, I want to ask him that question as to whether he gave information as to people who made the contributions.

THE COURT: You are entitled to ask that.

MR. HITZ: I think it has to be before the Committee.

MR. BURKINSHAW: We furnished photostats of all this.

MR. HITZ: I think the turning over of the material has to be before the Committee. With regard to the material we say that was not turned over, he doesn't claim he supplied any of that.

MR. BURKINSHAW: Yes, he does, and I claim it.

MR. HITZ: On page 231, which you read into the record—

MR. BURKINSHAW: I will admit very frankly he did not disclose the identity of purchasers of the books, but I will ask him right now if he revealed the identity of contributors of \$1,000 or more.

THE COURT: I think this should be on the record, shouldn't it?

MR. BURKINSHAW: Surely. After all, the  
230 jury doesn't know it is in the record.

THE COURT: I am not saying they do; but I think he has got to disclose it so the Committee has it.

Are you in position to show he did disclose the names and addresses of these persons?

MR. BURKINSHAW: I will show he disclosed the names and addresses of any contributors of \$1,000 or more, and he disclosed the identity of those making loans.

THE COURT: What is your charge here, Mr. Hitz? What I got from the record he said he wasn't going to give the names of any of them.

MR. HITZ: That is what I understand.

THE COURT: Let's get the record.

MR. BURKINSHAW: I will ask the question then.

THE COURT: All I get is what you have given me, of course.

MR. HITZ: Pages 271, 272, and 273 have extracts in the record.

THE COURT: All right; then on page 20:

"I am not going to produce the names of people who bought books, because, under the Bill of Rights, that is beyond the power of your Committee to investigate."

MR. BURKINSHAW: We concede that, absolutely.

THE COURT: Is that one of the things that was asked?

231 MR. BURKINSHAW: That is one of the things, yes.

THE COURT: And then I think there is a similar statement in connection with counts 6 and 7 on page 272 where it says:

"I will not give the names of purchasers of books, I have told you that repeatedly."

That is one of the things that is charged.

MR. BURKINSHAW: Absolutely; there is no question about that.

THE COURT: What do you want to do from now on, Mr. Burkinshaw?

MR. BURKINSHAW: I want to show that in his appearances before the Committee he disclosed before the Committee, either in June or in August, the identity of all persons who had made contributions of \$1,000 or more, as charged in the indictment.

I want to show that on several occasions of his appearance before the Committee he made disclosures, certainly by August, of the identity of anyone who had made any loans to the Committee, and these loans and the very source itself appear in the transcript of the record.

THE COURT: I assume what you are relying on is (a) in this "Receipts from the sale of books, pamphlets, and other literature?"

MR. BURKINSHAW: That is correct.

232 THE COURT: As I understand you, Mr. Burkinshaw, you are saying even if (a) be true, (that he didn't furnish these, by virtue of the fact he did furnish (b) and by virtue of the fact he furnished (c) therefore he cannot be held.

MR. BURKINSHAW: Absolutely, under the terms of that indictment. The Government is anchored to that indictment that charges three elements.

THE COURT: All right. Insofar as your request at this time relates to that, I will hold with you.

Now, where do we go from there?

MR. BURKINSHAW: I am going to ask him if on the occasion of his appearance there he made disclosure of the identity of any person or persons who made contributions of \$1,000.

THE COURT: I will deny that as immaterial. I assume you are talking about (b) now, aren't you?

MR. BURKINSHAW: Yes. Next, with respect to loans, I want to ask him if he made disclosure before the Committee of any of the five appearance there, of the

identity of persons from whom the Committee had obtained loans.

THE COURT: And I assume you would want to make the proffer that if he were permitted to testify he would say he gave the names of the contributors and did give the names of the persons who loaned.

MR. BURKINSHAW: Absolutely.

233 THE COURT: And I understand you further to say that he will say also he did not give the receipts, as has been testified here, from the sale of books, pamphlets and literature during this period, or the names and addresses of those persons.

MR. BURKINSHAW: Oh, absolutely, he did not give those.

MR. MAHER: As I understand it, he did not withhold information with respect to physical receipts.

MR. BURKINSHAW: Oh, no; that was all turned over, and we are going to show that.

THE COURT: In other words; he did not give the names and addresses of persons from whom the Committee received "Receipts from the sale of books, pamphlets, and other literature."

MR. BURKINSHAW: He gave all the data with respect to these sales, the amount of the sales, the figures; how much was received; the only thing he withholds is the identity of the persons buying the books, and his defense is he was doing that on advice of counsel.

THE COURT: All right. I will sustain the objection. I think you are fully protected.

MR. BURKINSHAW: I am wondering about that.

THE COURT: Is there anything else?

MR. BURKINSHAW: My position is that he made disclosure and now is prepared to show that he made  
234 disclosure as to all loans of \$1,000 or more, and of all contributions of \$1,000 or more, and I particularly want this in the record: I want to make proffer that all accounting information with respect to the sale



of books and other literature was made available to the Committee, or to its investigators, and Dr. Rumely declined to comply only with respect to the identity of these people.

THE COURT: You are going further than I went. As to this item (a) I think you have a right to show that.

MR. BURKINSHAW: Of what? Show what?

THE COURT: To show this item (a). I think he has a right to show that, or any part of it.

MR. HITZ: Names of contributors of \$1,000 or more?

THE COURT: Yes.

MR. HITZ: We don't rest our case on that. We don't claim that he failed to produce those.

THE COURT: I understand you don't. As I understand you, Mr. Burkinshaw, you are specifically stating he refused to give the names and addresses of persons who bought books, and so forth.

MR. BURKINSHAW: Absolutely, but all other material was provided, and I want to show this now.

THE COURT: All other what material, (b) and (c)?

MR. BURKINSHAW: No; all accounting information to show the number of books sold; the amounts derived from the sale of those books. In other words, all data, everything in the record—

THE COURT: Is that material to you?

MR. HITZ: I think it is objectionable; I make the objection.

THE COURT: I don't see where it makes any difference.

MR. HITZ: I think from there he will go into showing everything that he did produce which could possibly be called for here, and then we will be putting in the 95 percent that we have been hearing so much about.

THE COURT: Well, we are not going to put that in, Mr. Burkinshaw.

MR. BURKINSHAW: May I be permitted to ask the

witness about the financial data as to sales which he provided?

THE COURT: I don't see any objection to it. Did he do it, or do you know?

MR. HITZ: I think he did do it, but I think pretty soon we are going to get into that 95 percent field.

MR. BURKINSHAW: No, we are not.

THE COURT: If we are going to open up that whole thing I am not going to do it. I treat that as part of (a).

MR. BURKINSHAW: I want to show that the accounting information was turned over but not the names of the purchasers.

THE COURT: I will let you ask that, but if you are going beyond that I might as well hold fast now.  
236 You are going to stick to (a)?

MR. BURKINSHAW: Yes, and you don't want to have me go into the subject of loans or contributions?

THE COURT: No, sir, it is not material, and I think this other part is only remotely material, if at all.

MR. BURKINSHAW: My proffer is of record now. I am in position to show compliance with (b) and (c).

THE COURT: And I will permit him to do that as to (a).

MR. HITZ: I hope we can keep it there.

THE COURT: Well, now, we are going to keep it there.

MR. HITZ: Here is one further thing. I think the statement that was made by Mr. Burkinshaw in urging his opposition to my objection, in the hearing of the jury, might be confusing to the jury.

I wonder if the reporter could read to us what was said to us before we came to the bench, to see if it ought to be cured by a statement to the jury that it is incompetent and is a statement of counsel and is not evidence in any way?

THE COURT: I do think that was an unfortunate statement where you said "compliance," because—

MR. BURKINSHAW: You better explain it then.

THE COURT: I think it would be better for you to do it than for me, but I will do it if you want me to.

MR. MAHER: I am afraid if you do it the jury will think it was not compliance.

THE COURT: Why don't you state you want to withdraw your statement that there was compliance, and you say it yourself?

MR. MAHER: Would he be permitted to state substantial compliance?

THE COURT: I don't know where substantial is.

MR. BURKINSHAW: I have no objection to doing it along that line, but I don't want to confuse the jury. I don't think it is of such importance to bother the jury with.

THE COURT: I think it was unfortunate, because the issue is whether it was or was not.

Mrs. MacReynolds, if you can find that statement by Mr. Burkinshaw, will you read it to us, please?

THE REPORTER: (Reading):

"I offer it, if the Court please, for two reasons: One, to show compliance with the demand of the Committee by turning over to the Committee's agents"—

MR. BURKINSHAW: Well, I am perfectly willing to do whatever your Honor says, that won't hurt us.

THE COURT: I don't want to hurt either side.

MR. HITZ: I think it fairly important to the jury.

238 MR. BURKINSHAW: I might say, ladies and gentlemen of the jury, just before going to the bench, in a little discussion had before the admission of a certain paper, I used the word "compliance." I didn't mean compliance at that time, and as far as I am concerned I should much prefer that you just disregard it in that respect.

BY MR. BURKINSHAW:

Q Now, Dr. Rumely, with respect to the sale of books and other literature of the Committee for Constitutional

Government, what, if anything, in the way of accounting and financial information did you provide the Buchanan Committee, or its agents and representatives?

Is that agreeable, your Honor?

THE COURT: I think that conforms.

BY MR. BURKINSHAW:

Q Do you understand the question, Doctor? A We gave the total amounts received. We gave all the information they asked except the names of the purchasers of the books.

I would like to correct one thing; it is before the jury—

THE COURT: Just a minute. You had better  
239 talk to your counsel.

MR. BURKINSHAW: Let me see what he wants to say.

(Defense counsel conferred with the witness on the stand.)

BY MR. BURKINSHAW:

Q Count No. 7 of this indictment recites—that is the pertinent portion, Doctor—as follows:

“Defendant Edward A. Rumely appeared as a witness before the said Committee at the place and on the date above stated and refused to answer a question put to him by the Committee, namely, who was the woman from Toledo who gave him \$2,000 for distribution of ‘The Road Ahead.’”

That refers, Doctor, to a woman giving you \$2,000 for the distribution of that book. A This woman did not give us \$2,000 to distribute the book. She sent a check for \$2,000 and said “I want to take advantage of your special offer at 50 cents a copy to send a copy of the book to the school teachers and clergymen of greater Toledo, and I will send you the list within a day or two to whom I wish this book sent.”

She sent the check and we distributed the books to the list she sent in. It was not a contribution; it was an outright purchase for a particular purpose she designated,

and a purpose we fulfilled. We sold the books on  
 240 two bases, one, that the purchaser got them all in  
 bulk, or, if the purchaser supplied a list of names  
 to which they wished them sent we would send them out  
 to the list of purchasers designated, but in either case we  
 were not free: we had to do what the purchaser ordered.

Q I believe you testified that you provided the financial  
 information with respect to the sale of books but with-  
 held— A (Interposing) Only the names of the pur-  
 chasers.

MR. BURKINSHAW: That is as to Count 1:

THE COURT: Did that include names and addresses,  
 Doctor?

THE WITNESS: Names and addresses, yes.

THE COURT: Those are the two things you said you  
 would not give.

THE WITNESS: We would not give the names or  
 the addresses of the people who bought the books.

BY MR. BURKINSHAW:

Q Now, with respect to Count 6, that is the count  
 dealing with the so-called August subpoena: What in the  
 way of financial information with respect to the sale of  
 books and literature did you provide the Buchanan Com-  
 mittee, or its agents? A We gave them transcripts of  
 all the points that they raised, from our books, under  
 oath.

241 Q That is the general financial data aside from  
 the identity of the purchasers? A They asked 25  
 questions, and we gave them—

THE COURT: No, Doctor: your counsel is asking  
 you now with reference to Count 6, whether you gave all  
 the information with respect to the financial data.

BY MR. BURKINSHAW:

Q Do you understand that, Doctor? A I don't.

THE COURT: I don't blame him.

MR. BURKINSHAW: Let's restate it.

THE COURT: And I wasn't referring to you either,



Mr. Burkinshaw, when I said I don't blame you; I was referring to myself. Suppose you reframe the question. Maybe I have confused him more.

BY MR. BURKINSHAW:

Q What financial data did you give the Buchanan Committee, or its agents, under the demands incorporated in the August subpoena? What financial data did you give them with respect to the sale of books? A On the 25th?

Q Yes. A That is all in the record, printed.

Q Just summarize it for the jury. A They asked 242 for 25 different checks that they had discovered, and which they mistakenly thought were unreported contributions. We gave them an explanation of each one of these checks. Some of them did not come to the Committee at all.

Q Now, Doctor, did you turn over to the Committee, or to its investigators, correspondence with respect to those checks? A Yes; we gave them a digest. Mrs. Himsworth brought it down and it is in the record.

MR. BURKINSHAW: I believe you may cross-examine, Mr. Hitz.

THE COURT: Before you start, Mr. Burkinshaw, do I understand, Doctor, as to that Count 6 that you did not give the names and addresses of those persons?

THE WITNESS: That is right; that is the one thing we withheld.

THE COURT: All right. Cross examine.

*Cross Examination*

BY MR. HITZ:

Q Dr. Rumely, I may be a little confused, but I think you stated in your testimony to the Committee at one point that you turned over all of the information that you had on 25 of the 26 items that Mr. Little asked you to provide for him. Is that correct, sir? A We did.

243 Q And how long did it take you to do that? A We released everything in the office and let them

go through the files, through our books of account, through our filing room, and they took about 1000 letters, and they asked us to photostat them—

Q (Interposing) I only asked you how long it took, sir, about how long? A To get that?

Q Yes, sir. A They got a great deal of it by going directly to our files and records.

Q You mean they did most of the work, after you had shown them where to go? A They did it in the office, yes.

Q And there were 26 items, weren't there? A There were 26 items.

Q And you have referred to only 25. A We said immediately we will give you everything on 25, but we are doubtful about the 26th, the names of the purchasers, and I said, "If you stumble on the names, you must agree not to take them until we decide that question. We want to consult counsel."

And in Mr. Little's presence I called up Mr. Brown of The Editor and Publisher, and I said, "What do you think of this?" And he said, "I think it is a violation of the First and Fourth Amendments."

Q And so you finally determined that your rights protected you from turning over Item 26, is that correct?

A Our advice from all sources was that the First and Fourth Amendments protected us as publishers against forced disclosure of the names of our purchasers of our books.

Q So you didn't turn over the names of the purchasers of the books at that time? A We did not.

Q That was early in May. A It was my understanding—

Q Just a moment. A We did not turn them over. They went through the file, but I said, "If you stumble onto the names of the purchasers of the books, you must not record it until we get advice from counsel."

Q And so far as you know they respected that agree-

ment? You called it a gentleman's agreement. A I saw no evidence that they violated it.

Q And you have never turned over the names and addresses of the purchasers of your books, have you, Doctor?

A We never have.

Q And you didn't do it under the first subpoena, which was returnable on June 6th, or under the second sub-  
245 poena returnable in August, did you? A That is right. We turned over everything else.

Q You have such record of the names of the purchasers in your office? A We have them scattered so that you couldn't get them.

Each day as our mail comes in we list every check and many of them were a dollar and two dollars. On one date two thousand remittances came in, and that makes a sheet that long (indicating) with 20 names on it, and some days we had 40 sheets like that, and we had 80,000 entries of that kind that we would have had to go back to, had we wanted to comply with that demand.

Q Are you saying you couldn't comply, or you thought you didn't have to comply? A Our stand was that we didn't have to comply to supply the names of people who bought our books, but in addition to that it was physically impossible within two days to do more than one month out of 43.

Q And as a result you didn't supply the names of any purchasers, did you? A We did not supply the name of any purchaser of any book, because we felt that was a violation of our rights as publishers.

Q The name of the lady from Toledo, did you  
246 have that lady's name in mind when you testified before the Committee? A I certainly did.

Q So it was not impossible with respect to that, was it? A No. I knew the lady, I had met her, and she had bought 4,000 books, and I had been advised we were not advised to mention the names of people who bought our books.

Q Do you wish this jury to understand, Dr. Rumely, that it was impossible for you to obtain the names of the purchasers of any of your books from that office within three days. A Oh, we could have found the names of some of the purchasers, yes, but we couldn't make that 43-month compilation that was called for within ten or twelve weeks.

Q But you could have gotten a great many of the names, couldn't you? A We could.

Q So you really relied on your feeling that the Committee couldn't require the production of the names and addresses, isn't that so? A I relied upon our long contact with the Bill of Rights, of which we distributed a quarter of a million copies, and promoted the idea that in this country anybody has a right to hear all sides of a question presented, and that nobody can interfere with that general presentation, and that is what we relied upon.

Q Except a court of law which ultimately will decide the question.

MR. BURKINSHAW: Oh, if the Court please, I object to that. A court of law is not going to decide that question.

THE WITNESS: Not against the Constitution.

THE COURT: The court of law is going to determine from the issues in this case whether there has or has not been a violation.

MR. BURKINSHAW: Absolutely, and nothing more.

BY MR. HITZ:

Q And of course you realized then and you realize now, do you not, Doctor, that whether or not you had to turn them over to the Committee is a question that a court and not your attorney is to decide? A No, I did not.

Q You did not? A No.

Q Do you know it now? A I relied on the advice of my attorneys and on our long familiarity with the Bill of Rights.

We put a quarter of a million copies of the Bill of Rights into the schools of the country.

Q Dr. Rumely, when Mr. FitzGerald served the  
248 first subpoena on you, at that time you told him you would not provide the names of the purchasers of any of your books, isn't that correct, sir? A That is right.

Q When he served upon you the second subpoena, on August 22, 1950, you again told him that you would not supply the names of purchasers of your books; is that correct? A On the long subpoena I told him we had already given the agents of the Committee 95 percent of what they asked for, but on the one question "Who bought your books?" we would not yield.

Q And you told Mr. FitzGerald that when he served the second subpoena. A I don't know whether I told him that, but that was the stand we took before the Committee.

Q Have you a copy of the proceedings there, Doctor? A No, but it is here in the record.

Q I will ask you if on June 6th you didn't tell the Committee this, which was almost immediately after you were asked for the first time in 1950, as a witness before this Committee—

MR. BURKINSHAW: What is the page, please?

MR. HITZ: Page 20 of part 4.

BY MR. HITZ:

Q After having told Mr. Little, and his staff,  
249 that you didn't want him to obtain the names of purchasers of books from your files if he stumbled on them, and after telling Mr. FitzGerald in May that you would refuse to produce the names of the purchasers of the books, and after, according to your recollection, possibly repeating that again to him in August, did you not say this, on the first opportunity before the Committee:

"I am not going to produce the names of people who bought books because, under the Bill of Rights that is



beyond the power of your Committee to investigate?" A That is right.

Q And several other dates as well, when the Committee came to that subject, isn't that so? A That is right. I think it wholly out of the power of Congress to legislate on anything pertaining to the free press, and they have no power to investigate that on which they cannot legislate.

MR. BURKINSHAW: Might I at this point—Has your Honor that paragraph before him at this time?

THE COURT: On page 20?

MR. BURKINSHAW: Yes. Mr. Hitz read just a portion there on page 20 of the reply given by Dr. Rumely. I think the entire context should be read so that the jury may have before it precisely what the question—

250 MR. HITZ: I will be glad to do that. I will read the whole reply of Mr. Rumely, if you like.

MR. BURKINSHAW: Read Congressman' Brown's question.

MR. HITZ: All right. You understand, Doctor, that I am about to read the entire answer you made. I only read part of it a minute ago. Mr. Brown asked you this:

"Mr. Brown. Yes. I would like to know what records you are willing to produce, and what records you feel you should not produce, and the reason therefor?"

and then your full reply:

"Mr. Rumely. I am willing to produce the records of all contributions of \$1,000 or more within the period designated; I am willing to produce the records of all loans within the period designated, except a few that related to the promotions of The Road Ahead, and advertising Fighters for Freedom, which has nothing to do with lobbying. I am not going to produce the names of people who bought books because, under the Bill of Rights, that is beyond the power of your Committee to investigate."

BY MR. HITZ:

Q: That was your stand throughout, that the Committee had no right to those names or addresses of  
251 purchasers, isn't that right? A That is right.

MR. HITZ: No further questions, Your Honor.

*Redirect Examination*

BY MR. BURKINSHAW:

Q Now, Dr. Rumely, Mr. Hitz has asked you on cross examination with respect to the conversation that you had with Mr. FitzGerald on the occasion he served this so-called May short subpoena on you. A Yes, sir.

Q I now should like to have you tell His Honor and the ladies and gentlemen of the jury the rest of that conversation, as best you remember it now. A Have I anything to refresh my recollection now?

Q No, not that I know of, except what took place and what was discussed in the course of that conversation with yourself and Mr. FitzGerald, on the occasion he served you in your offices on May 26, 1950. A August 22?

Q No, no; this is May 25. A May 25?

Q Yes.

THE COURT: I assume you mean other than what he has already testified to, Mr. Burkinshaw?

MR BURKINSHAW: Yes.

252 THE COURT: Have you anything to add as to what took place there, Doctor?

THE WITNESS: I am a little confused because I don't recall what I said to Mr. Little or what I said to Mr. FitzGerald, but to one of them I explained that we had investigated and were investigating further our rights as publishers, and that up to that time the word was that we were wholly under the protection of the First and Fourth Amendments, and that on that account, while we were complying with everything else, we would not release the names of buyers of our books.

BY MR. BURKINSHAW:

Q And did you have a further conversation with Mr. FitzGerald when he was present in New York on August 22, when you were served with the second subpoena?

A Except as I have testified, that I stated to him that we had given 95 percent, and that we would not give the names of buyers of our books, but by that time we had consulted in all directions everyone who could give us sound advice.

THE COURT: I think he has given that before.

253 THE COURT: Other than character witnesses, have you anything further?

MR. BURKINSHAW: I want to call Mrs. Hims-worth; she is the chief financial officer of this outfit, and she prepared all this data with reference to the financial affairs of the Committee and turned it over.

MR. MAHER: Your Honor, I have this observation. I believe Mr. Hitz, in his cross-examination, attempted to possibly inquire into Dr. Rumely's state of mind as to his intent not to produce the records.

MR. BURKINSHAW: He certainly opened the door.

MR. MAHER: Your Honor has excluded it. We attempted to show that in our direct examination and you excluded it.

THE COURT: Excluded what?

254 MR. MAHER: You excluded what Mr. Rumely did in an attempt to show his good faith.

THE COURT: I don't think I excluded it. He came out and said repeatedly he did 95 percent of the things and he called on lawyers and he called on senators and he called on committee men.

MR. MAHER: I know, your Honor, virtually all of this was elicited in response to questions by Mr. Hitz.

THE COURT: Oh, no.

MR. BURKINSHAW: When Mr. Hitz went into Dr.

Rumely's state of mind on this proposition he opened the door on the proposition of things that had heretofore been denied us.

THE COURT: I don't understand that.

MR. BURKINSHAW: Your Honor would not permit us to go into this proposition of good faith. You wouldn't allow us to go into the proposition of his obtaining legal advice.

THE COURT: He has done it. He said he got all the legal advice.

MR. BURKINSHAW: That doesn't suffice for our purpose.

THE COURT: I still hold it is immaterial. You are protected on the record.

MR. BURKINSHAW: I still want to go back to the proposition of a man's state of mind as bearing on the proposition.

THE COURT: I think you are adequately protected.

I am not going to go any further than what I  
255 said to you that I would.

In other words, I am going to instruct that willful in this case means deliberate as distinguished from accidental and does not embrace evil motive.

MR. BURKINSHAW: Will you go further and say intention?

THE COURT: If you mean by intention, deliberate refusal, direct, knowingly, yes.

MR. MAHER: Will your Honor instruct also on physical impossibility?

THE COURT: I will have to reach that when you prepare your prayers. I don't know whether it is appropriate under the circumstances or not. I am not closing that door, Mr. Maher. You present any prayers you have and then we will deal with it.

MR. BURKINSHAW: There is another thing that isn't entirely clear, and I want to get it straightened out, and that is do I understand there is an agreement here

that if Halleck and O'Hara appeared they would testify on this proposition regarding pertinency that they didn't consider that it was the function of the Committee to investigate publishers?

THE COURT: You said that.

MR. HITZ: That is right.

MR. BURKINSHAW: Is your Honor restricting that to the question of pertinency, or is it something  
256 that may be used before the jury?

THE COURT: I think it related to pertinency only.

MR. BURKINSHAW: The thing I am trying to find out is this: That under an appropriate instruction on your Honor's part as to pertinency, should I be limited in arguing to the jury?

THE COURT: I am going to instruct as a matter of law that pertinency is present, and as a matter of law it is not a question for the jury to determine.

MR. BURKINSHAW: We still have something we want to discuss tomorrow.

THE COURT: All right.

MR. BURKINSHAW: I want to renew my motion then.

THE COURT: As I understand now, all that you presently know you might have would be additional character witnesses.

MR. BURKINSHAW: That is right, and I might not use them.

THE COURT: And there is a possibility you might want to call this lady who has the financial records.

MR. BURKINSHAW: Yes.

THE COURT: And then that is all?

MR. BURKINSHAW: That is all.

THE COURT: And then you have nothing further?

MR. HITZ: We have nothing further at this time, and probably won't then.



THE COURT: Have you prepared any prayers?  
 257 MR. BURKINSHAW: Yes. I have a couple of prayers, both based on the Murdock case, on the subject of good faith and the definition of willfulness.

THE COURT: What other instructions?

MR. MAHER: Will your Honor give the instruction that the establishment of good character in and of itself is evidence of good faith?

THE COURT: I will give the general instruction that even if the other evidence were convincing that evidence of good character alone might be sufficient.

MR. BURKINSHAW: For the most part I know I will be quite content with your Honor's general charge. As to special charges I will offer probably two or three.

THE COURT: Particularly so that you protect yourself on the Murdock case.

MR. BURKINSHAW: Yes, that is my prime purpose.

258 MR. BURKINSHAW: I do want to renew my motion again tomorrow morning.

THE COURT: I will give you an opportunity.

262 MR. BURKINSHAW: Out of an abundance of caution I want to repeat what I already have made perfect as to another point, and that is, that Dr. Rumely will testify that each and every requirement demanded under Count 6 was complied with by him. That is the August subpoena.

THE COURT: You mean by that that you are saying he furnished the names and addresses?

MR. BURKINSHAW: Only the names and addresses.

THE COURT: Except the names and addresses. The record will speak for itself. As a matter of fact, I think that is a fact, isn't it?

MR. HITZ: That he furnished the names and addresses of others than purchasers, you mean?

THE COURT: No, I don't think Mr. Burkinshaw said that. What he says is that there has been a compliance insofar as Count 6 is concerned save for the fact that he did not give the names and addresses of those persons there concerned.

263 MR. MAHER: Books—not contributions. He gave everything in here, everything in this count here.

MR. HITZ: He didn't give everything. That has been running through this case as a completely mistaken impression.

Those checks were gotten by a subpoena from the bank; he didn't have them; he couldn't produce them. Those checks were back in the microfilm part of that bank, and when you gentlemen say that he produced them you mean they got them by their own independent subpoena duces tecum and one they couldn't refuse, and couldn't act under his control. To that extent he produced them.

MR. MAHER: Didn't he authorize the bank to go into these accounts?

MR. HITZ: He authorized the bank but they could have gotten them independently. He didn't produce them. I don't think it makes any difference.

MR. MAHER: He did not refuse to produce these checks.

MR. HITZ: He never had them.

MR. MAHER: Then why is he charged with it?

MR. BURKINSHAW: He turned over everything under Count 6 that he was physically able to get out.

MR. HITZ: That's not in the record and it is no part of the case here.

264 THE COURT: I don't understand you, Mr. Burkinshaw. This says "Showing (a) the name and address of each person from whom a total of \$500 or more has been received by the said Committee during the period from January 1, 1947, to August 1, 1950, for any purpose." Which as I read it is as broad

as Count 1, isn't it, namely, wherein they received receipts from the sale of books, pamphlets, and other literature, contributions, loans, and so forth.

MR. BURKINSHAW: I say he offered to comply and did comply with respect to everything in there with the sole exception of the identity of purchasers of the books.

THE COURT: I think that is right, with that sole exception, yes.

You have no objection to that, have you?

MR. HITZ: I don't think ~~they~~ have proved that, but I say this whole case doesn't actually go beyond the refusal to turn over the names and addresses of the purchasers. We don't maintain anything different from that.

MR. MAHER: There is no allegation in Count 6 that he refused to turn over the names of the purchasers, none whatever.

MR. HITZ: It is included in the "for any purpose," "names and addresses for any purpose," as the count indicates.

MR. MAHER: Of those who contributed more than \$500.

THE COURT: I think we had better let the record speak for itself.

MR. BURKINSHAW: I really think Count 6  
265 should go out, in view of the testimony that has been received here.

THE COURT: You would want to put an interpretation on Count 6 different than on Count 1?

MR. BURKINSHAW: Of course.

THE COURT: But you are not contending that insofar as the names and addresses of persons from whom a total of \$500 or more had been received by the Committee were furnished insofar as any acquisitions of books or pamphlets is concerned. That is the situation, isn't it?

MR. BURKINSHAW: I don't think the count charged withholding the names and identity.

MR. MAHER: We are having to guess on what we are asked to defend. We are going to have to guess that they mean by "any purchasers" books purchasers. They don't say it.

THE COURT: Of course you had an opportunity to seek to make it more definite and certain sometime back, if you had desired it.

I don't think you were in the dark as to that, because that was the whole entire purpose in the registration before the Committee.

MR. MAHER: Your Honor, I don't think the failure to ask for a more specific definite charge should preclude us from defending the charge as made.

THE COURT: You can defend it if you can. It you are prepared to say that he did do this, of course you can.

266 MR. MAHER: We are prepared to say that he did everything as charged in this indictment, in Count 6.

THE COURT: And he has said that he has done 95 percent of it, but he has said that he has not given the names and addresses of persons who bought books in the category of \$500, or in the category of \$1,000.

MR. MAHER:—If you read that to mean purchasers of books.

THE COURT: I read it for what it says, "For any purpose."

MR. BURKINSHAW: I think we have made our point.

THE COURT: Yes.

MR. BURKINSHAW: Another thing on the subject of this indictment. It happens five counts charge other offenses and the five counts have been dropped.

THE COURT: Before you argue, you move to dismiss as to those counts?

MR. HITZ: Yes.



MR. BURKINSHAW: May I refer to the fact in my argument?

THE COURT: You certainly may say that they have been dropped, yes. I am going to instruct the jury as soon as we get to it.

MR. HITZ: They weren't in the case from the outset. I think the only time that would arise is if the jury is given a copy of the indictment. I never even  
267 mentioned that they were Counts 1, 6 and 7. I think I referred to them as charges so that they wouldn't even know the difference.

MR. BURKINSHAW: And I want to have that covered.

THE COURT: You are moving to dismiss, and I am going to instruct them that they have been dismissed. I think they are entitled to that, because they will get the indictment.

MR. HITZ: If they get the indictment, then it's true.

MR. MAHER: At the appropriate time I think we shall object to the indictment being given to the jury.

THE COURT: I think you have cut me off as to what I was going to do.

MR. BURKINSHAW: I would rather for the Court to instruct the jury that the five counts have been dismissed.

The next thing is this: Charlie Halleck is here, and I am going to use him generally as a character witness. At this time I make proffert of this: I want to put him on the stand before the jury for the purpose of eliciting from him two things: (1) that there was no meeting of the Buchanan Committee to authorize the issuance of the subpoena.

THE COURT: That has been stipulated.

MR. BURKINSHAW: But even though it has been stipulated, I still make proffert of proof as to that.

Secondly, that Congressman Buchanan, after the is-



268. suance of that subpoena and service, and after Dr. Rumely appeared, Mr. Buchanan called a meeting of his committee about a month later and frankly admitted that the May subpoena had been invalidly issued and wanted to call a meeting for the issuance of a subpoena which forms the basis of Count 6. I want that to go in evidence.

THE COURT: We will treat that as a proffer and he will not testify as to that.

MR. BURKINSHAW: You are ruling he may not testify to that?

THE COURT: That is right.

MR. BURKINSHAW: Neither as to the failure to have a meeting?

THE COURT: As to both things you proffer.

MR. BURKINSHAW: The third is this: I desire to make proffer of testimony from Mr. Halleck that as a member of the committee, designated by the Speaker of the House, to investigate lobbying, he did not consider that the committee had any authority whatsoever to go into—

THE COURT (interposing): That is already in.

MR. BURKINSHAW: Your Honor will not permit him to testify as to that before the jury?

THE COURT: That's right. It is for that reason I assume you are making this proffer.

MR. BURKINSHAW: That is right.

THE COURT: But you want to call him as a witness.

269 MR. BURKINSHAW: That is right.

THE COURT: And we will do that.

MR. MAHER: May I ask whether your same ruling as you applied it on other character witnesses as to his respect for constituted authority will not be permitted?

THE COURT: I don't think it is material.

MR. HITZ: I don't think so.

MR. BURKINSHAW: In other words, the Court is pinning us down with respect to character testimony?

THE COURT: That is right.

MR. BURKINSHAW: Just to truth and veracity?

THE COURT: That is right.

MR. BURKINSHAW: And nothing further?

THE COURT: That is right.

MR. HITZ: So that takes care of that.

THE COURT: When you call Mr. Halleck, will that be your case?

MR. BURKINSHAW: Yes, that will be our case.

THE COURT: Are you going to have anything further?

MR. HITZ: No.

270

*Charles Abraham Halleck*

*Direct Examination*

BY MR. BURKINSHAW:

Q Your full name, Congressman. A Charles Abraham Halleck.

Q And you are Congressman from Indiana? A That is right, sir.

Q And from what district? A Second Indiana District.

Q And what community? A I live in Rensselaer, which is northwestern Indiana, I might say.

Q You are a Member of the House of Representatives, Mr. Halleck? A Yes, I am a member.

Q You have been for how long? A Well, I guess it something over 16 years now.

Q Did you serve as a member of the committee designated by the Speaker of the Houses of Representatives to investigate lobbying activities? A I did.

Q Do you know the defendant in this case, Dr.  
271 Edward. A. Rumely? A I do.

Q Do you know others in Indiana who know  
him? A I do.

Q Are there many or few? A Oh, I would say—  
that is, comparative—I know a great many people who  
know Dr. Rumely.

Q Do you know the reputation borne by Dr. Rumely  
among those people, for truth and veracity? A I do.

Q And what is that reputation, Congressman? A  
Well, it is good.

MR. BURKINSHAW: I believe that is all. You may  
cross examine, Mr. Hitz.

MR. HITZ: No questions.

MR. BURKINSHAW: Thank you, Mr. Halleck.

MR. HITZ: Thank you.

(Witness excused.)

MR. BURKINSHAW: That is our case.

I have certain matters of law now to take up with the  
Court.

272 THE COURT: Have either of you gentlemen  
prepared any instructions?

MR. BURKINSHAW: Yes, we have.

THE COURT: Would you like me to read those? It  
might throw some light on what you are going to address  
yourself to.

MR. BURKINSHAW: First, for the purpose of the  
record, I want to renew my request, if the Court please,  
with respect to the argument made by me yesterday on  
motion for a verdict of acquittal.

I shall not at this time take up the Court's time by  
repeating the arguments made on that occasion yesterday.  
I think the Court is mindful of the position taken by the  
defense in this case, and I now renew that motion for  
judgment of acquittal on the grounds stated by me yester-  
day morning.

THE COURT: Very well.

MR. BURKINSHAW: Your Honor, before ruling on those prayers of course I should like to be heard.

THE COURT: Very well. There is one fragment that we haven't disposed of, as I recall it.

I treated the objection made by you as a motion to strike, and that was pending. My recollection is 273 that was in connection with certain checks. My further recollection is that defendant stipulated later on that parts of pages 276 and 277 be read. I am wondering, therefore, Mr. Hitz, whether you deem it still pertinent on a motion of strike.

MR. HITZ: That was in Volumn 5?

THE COURT: That is my recollection.

MR. BURKINSHAW: That is page 276, Your Honor.

THE COURT: Yes. I think it was particularly page 276, but it was more in combination with page 277.

MR. BURKINSHAW: That is the portion of Dr. Rumely's statement of August 25, which your Honor permitted me to read to the jury.

THE COURT: I think that is true.

MR. HITZ: I think that will dispose of it.

THE COURT: Therefore, the motion to strike is withdrawn.

MR. HITZ: That is correct.

THE COURT: I just wanted to clear the record.

MR. HITZ: Yes; thank you.

THE COURT: Very well. Now I do understand from you, Mr. Burkinshaw, that you desire the Court to specifically state the disposition with reference to the other counts?

MR. BURKINSHAW: yes.

THE COURT: You have made your motion and now you are turning to your prayers.

MR. HITZ: I have a few prayers I am submitting. 274 Could the Court consider the Government's prayers first? I think it might be not only more

orderly but I think my prayers make an effort to cover perhaps a little more of the case than do the ones of the defense, and maybe one will supplement the other.

THE COURT: I think I shall state for the record that I deny the motion for judgment of acquittal at this time. You renewed your motion on the grounds stated?

MR. BURKINSHAW: I did.

THE COURT: Now we will turn to the Government's requests for instructions.

MR. BURKINSHAW: When Your Honor has completed reading those I should like to be heard.

THE COURT: All right.

*Argument on Requested Prayers*

THE COURT: I have read the proposed instructions. Do you have anything to say with reference to the Government's requested prayers, Mr. Burkinshaw?

MR. BURKINSHAW: Yes, we have, if the Court please.

With respect to Government's prayer for instruction No. 1, I don't know whether to characterize it as a Government summation instead of a prayer, or a Government request for a directed verdict of Guilty.

To go through this thing, take the first paragraph:

"The Court instructs you, as a matter of law that these papers served upon the defendant were adequate and valid summonses charged in the indictment in this case and that, therefore, it was the duty of the defendant to produce the papers requested and furnish the information asked for."

From my observation with respect to that, if the Court please—

THE COURT: You need not argue that; I am not going to give that in the form in which it is written:

MR. BURKINSHAW: All right.



THE COURT: I do want to state to you, though, that what is introductory to that, namely, that I will hold as a matter of law the Committee was validly constituted and the committee had jurisdiction over the matters under consideration, and the records and information requested were pertinent to its inquiry, and that the committee had a reasonable basis for issuing the subpoena. Those are questions of law.

MR. BURKINSHAW: I think Your Honor has a right, if your Honor so finds, to charge the jury in the language of the Sinclair Case, that the records sought were pertinent. I don't think Your Honor should go beyond that.

With respect to the second page, the second paragraph, there is the following language; it is about 10 or 12 lines down:

276. "He makes the same claim with reference to the production of those papers on August 25, in answer to the subpoena served upon him on August 22, but, again, he admits he could have produced some of the names and addresses of the purchasers of the books."

My observation in that respect is this: He is not charged with withholding the names of some of the purchasers of the books; he is charged with withholding the names of all those who purchased.

THE COURT: Suppose he was charged with stealing 17 hams, and they found that he stole 16?

MR. BURKINSHAW: He might not have stolen but one and a grand larceny prosecution would fail because it was not within the terms of the statute.

I say this: If the Government elected to allege as a matter of pleading in the indictment, that he refused to produce the names of all and then comes into court with the contention that the requirements of that count are met by proving only some of the proof, I say the Government has failed and the defendant is entitled to a directed verdict as to that count.

**THE COURT:** I might help you—I am not going to give the charge in the language here used.

**MR. BURKINSHAW:** Very well; that takes  
277 care of my objection.

**THE COURT:** I do not generally review all the testimony. Such part of the testimony as I review will be in connection with the applicability of the particular charge. I don't want to give the impression that I do not recognize the right of the Federal Courts to comment, but I am not going to utilize that.

**MR. BURKINSHAW:** On the right of the Federal Courts to comment, Your Honor I know is mindful of the statement by the Supreme Court in the Murdock case, about which we spoke yesterday, and to which I shall presently address my attention.

Prayer No. 2, if Your Honor please, reads as follows:

"The defendant further seeks to excuse his refusal to furnish the names of the purchasers of his books on the ground that the constitution protects him from disclosing this information and that he was so advised by his counsel. But I charge you that such a reason is not an excuse for refusing to furnish the Committee with the information which it sought and which the defendant refused to furnish because, as I have already told you in defining the word 'wilful' as it is used in this indictment, the defendant's reason or motive for the refusal is unimportant and should not be considered by you. The test that you should apply to the defendant's refusal is

278 to determine whether it was 'wilful', which means only that it was deliberate and intentional as distinguished from being inadvertent or accidental.

In other words, the defendant's good faith or lack of it in refusing to furnish the Committee with the information it sought makes no difference on the question of guilt or innocence of the defendant in this case."

**THE COURT:** In connection with that I assume you are going to argue proposed prayers of the defendant Nos. 1 and 2.

MR. BURKINSHAW: Yes, I should like to have my views known.

The United States Supreme Court in a criminal case involving the use of the word "wilful" held—and that was *Murdock versus United States*; 290 U. S.—that it was reversible error on the part of a trial court to refuse to charge a jury as follows:

"If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."

I say that is the language of the United States Supreme Court. I say further that that holding of the United States Supreme Court remains unmodified, unaltered, and unchanged as the law of the land to-day, and I say it is not only binding on the citizens it is binding on the court, and I honestly and respectfully represent to Your Honor that Your Honor not only has a right to give that charge to the jury, contained in the *Murdock* case, but I charge that having been enunciated by the Supreme Court of the United States as the law of the land that it is the manifest duty of Your Honor to give that charge to the jury.

Whatever this trial court has done on other occasions with respect to refusing to grant a charge that has been approved by the United States Supreme Court with respect to an indictment charging the wilful commission of a crime, whatever our Court of Appeals might have done in glossing over that, I say still that the dicta of the United States Supreme Court is the law of the land, and Your Honor is bound not by what has been held by your brethren on this trial bench, or what has been held by our Court of Appeals, if Your Honor accords that interpretation to certain cases of the Court of Appeals. I say you are not bound by the trial court's action or by the holdings of the United States Circuit Court of Appeals

for the District of Columbia, insofar as the holding of either the trial court or the intermediate Court of Appeals collide with a clear, crisp definition of a charge that should be given to a jury in a case such as this.

I say there is no justification whatever for the Government urging upon you, as a member of this  
280 trial court, that you should disregard and ignore a charge that not only has the United States Supreme Court granted, but a charge which, when refused by a trial court in southern Illinois, was held by the United States Supreme Court to be reversible error.

And it is awfully important that I call Your Honor's attention to the fact that the opinion of the court in that case, the Murdock case, was written by Justice Owen J. Roberts, who as a trial lawyer, as a lawyer who had argued the Sinclair civil contempt case in the United States Supreme Court, probably had had as much experience and acquaintance with the law relating to contempt, with the law relating to the use of the word "wilful" in a statute, or an indictment, as any man at the American bar.

I say this, that it is Your Honor's duty to follow not your brethren on this court, or even our Court of Appeals, but to follow the United States Supreme Court, which I say still occupies the position of being the ultimate tribunal in our court's judicial system.

And when the Supreme Court has pointed the way, when the Supreme Court explicitly has held that a jury has a right to consider the matter of good faith, I think it is Your Honor's manifest duty so to charge.

This defendant in this case was denied the right to  
281 testify that he had consulted with counsel; that he had acted on the advice of counsel; that he had consulted with trustees of the Committee for Constitutional Government who are lawyers and eminent lawyers, and that he had acted on their advice; he was refused permission to testify, if the Court please, that he



had been advised of the holdings of the United States Supreme Court in repeated cases as bearing on the proposition of encroachment on the part of an investigating committee. He was refused permission, if the Court please, to testify before this jury that he had been advised by counsel of his selection that the Buchanan Committee was out of bounds; that it was encroaching on the rights of the individual citizen; that the demands made by the Buchanan Committee both by subpoena and by question, encroached on the rights guaranteed to him under the First Amendment to the Constitution of the United States.

I say, if the Court please, that this prayer, colliding as it does with the law of the land as enunciated by the highest authority, the Supreme Court, this prayer of the Government, No. 2, should be rejected, and instead that prayers offered by the defendant in this case, Nos. 1 and 2, should be granted.

No. 1, which Your Honor has before you, says this, and this is the language of the United States Supreme Court..

THE COURT: I have read it, and you have read it too.

MR. BURKINSHAW: I didn't read the first 282 one; I read the second. The first one is only a few lines:

"The word 'wilful' often denotes an act which is intentional or knowing or voluntary as distinguished from accidental, but when used in a criminal statute it generally means an act done with a bad purpose."

The Supreme Court of the United States has seen fit, if the Court please, to provide a definition of a word used in a statute, as in this connection, the use of the word "wilful"—

THE COURT: That word is in this statute, but the word to which the Court was referring was in a different statute.



MR. BURKINSHAW: It was in a different statute, but the language of the Supreme Court does not say with respect to that statute alone.

THE COURT: I can't assume the Supreme Court was talking about anything but the case at hand.

In this jurisdiction we have had a number of cases to the Circuit Court of Appeals and which have been the subject of study by the Supreme Court wherein they have denied certiorari, wherein the substantial language offered by Government's prayer No. 2 has been granted, so I will deny your requested prayers 1 and 2.

MR. BURKINSHAW: I just have one further observation to offer with respect to that.

283 As Your Honor says, the Supreme Court was not passing on the contempt statute when it discussed the use of the word "wilful" in the Murdock case, but it did say this:

"But when used in a criminal statute it generally means an act done with a bad purpose."

So it was not restricted even to the statute that was before the Court at that time. It is my belief that the Supreme Court's definition ran to all criminal statutes where the word "wilful" ever is used.

THE COURT: I will deny your requested prayers Nos. 1 and 2, Mr. Burkinshaw.

I will not give Government's prayer No. 2 as written; I will give the substance, as I understood, from that prayer.

I think with reference to your prayer No. 3, that there is another principle of law which is applicable—I haven't the case with me now—that while it is true that the physical inability to produce would be a bar, however, where the physical inability is coupled with a specific refusal to do it on any ground then the physical inability to produce is not a bar.

I will try to cover that in a particular charge, to which you may take such exception as you see fit.

Do you recognize that principle?

MR. HITZ: Yes, we do, and we think that same  
284 thing is covered in a slightly different way by a full definition of the word "wilful."

THE COURT: For the purpose of the record I am going to deny defendant's prayers 3 and 4, subject to the qualification which I have stated. I mention that to you so that either or both of you may make use of it if you see fit, in the course of your argument.

MR. BURKINSHAW: Your Honor will remember to instruct with respect to dropping on the part of the Government five counts of the indictment?

THE COURT: I will, sir. I will do that prior to the argument. So that there will be no question as to what they are, they are Counts 2, 3, 4, 5, and 8.

MR. HITZ: That is correct.

MR. BURKINSHAW: Yes, sir.

THE COURT: In other words, you are now moving that they be dismissed, and I will grant your motion and instruct to that effect when they return.

We are now ready to proceed with the argument.

MR. MAHER: Your Honor, I assume you will instruct generally on the question of reasonable doubt and the weight of character testimony.

THE COURT: Yes, and the burden of proof, but after I have finished if either of you gentlemen have anything to say, come to the bench.

285 MR. HITZ: You stated Government's requested prayer No. 2 would be denied as written?

THE COURT: That is right.

MR. HITZ: Does that mean the Court will or will not make reference to the fact that advice of counsel—

THE COURT: I will make specific reference—I would like to tell you that, too, Mr. Burkinshaw, so that you will be advised. I am going to hold as a matter of law the mere fact he acted on advice of counsel is not an adequate bar to a prosecution.

MR. BURKINSHAW: Your Honor is going to give that charge to the jury?

THE COURT: In substance.

MR. BURKINSHAW: Therefore, that of course will admit of my discussing with the jury, in the court of my argument, the fact as appears in evidence that he did consult with counsel.

THE COURT: I don't think you should be cut off on argument. I am going to instruct as a matter of law that the mere fact he did obtain from counsel advice is not a bar to the prosecution. It is evidence in the case—I don't think it was admissible evidence, but it is in.

MR. HITZ: Therefore the argument should not be made.

THE COURT: That's right, the argument should not be made.

MR. BURKINSHAW: If Your Honor says, 286 and Mr. Hitz says, that it is in the record, if it is before the jury, and your Honor proposes to charge as to that phase of the testimony, it seems unduly harsh that there should be a ruling prohibiting counsel for the defendant from discussing that thing.

THE COURT: Excepting that it would be a nullity. In other words, I am going to be duty bound to say that the law is that that is not a bar to the prosecution.

MR. BURKINSHAW: I should probably like to refer to that, particularly in view of the fact that Your Honor proposes to give that unrequested instruction. The Government has not asked you to charge the jury as to that phase of the case.

MR. HITZ: I have, in Government's No. 2.

THE COURT: Oh, yes, he has, in terms recited that, but I don't think that is important.

You may make the statement, Mr. Burkinshaw, but I want you to be fully advised that I am going to say to them as a matter of law it doesn't make much difference.

MR. BURKINSHAW: I probably shall go no further than to allude to the fact that he did consult counsel, which is in evidence in this case.

THE COURT: All right. I don't think it is proper evidence, but it is in.

MR. BURKINSHAW: It is in there in response to a question on the part of the prosecutor in this case.

MR. HITZ: It is in there by a volunteered speech by Dr. Rumely to a question that called for a much more concise and shorter answer along with that plow that he started to make.

MR. BURKINSHAW: But it is in there.

MR. HITZ: It is in there.

THE COURT: Ladies and gentlemen of the jury, we will soon reach the point in the case where counsel will be given an opportunity to argue the case to you, both Government counsel and defense counsel.

I want to say to you as a preliminary matter, however, that there has been a motion by the Government that Counts 2, 3, 4, 5, and 8 be dismissed. The Court has granted the motion to dismiss Counts 2, 3, 4, 5 and 8, which means that you will have for your consideration three counts, Count No. 1, Count No. 6, and Count No. 7.

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### *Charge to the Jury*

THE COURT (Keech, J.): Ladies and gentlemen of the jury: We have reached the point in this case where it becomes the duty of the Court to instruct you as to the law of the case, and you are bound and obligated to follow the rules and principles as stated by the Court as being applicable to the case on trial.

On the other hand, you ladies and gentlemen of the jury are the sole judges of the facts, and necessarily,



therefore, it follows that it must be your recollection which shall control and govern in determining the facts in the case.

The defendant here Edward A. Rumely, is on trial under an indictment charging violations of Title 2, Section 192, of the United States Code.

First of all I shall repeat to you that you are instructed to disregard Counts 2, 3, 4, 5 and 8 of the indictment, which have been deleted on the face of the indictment lightly in pencil. In other words you are to concern yourselves only with Counts 1, 6 and 7.

The substance of the Act of Congress on which those three counts is based reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before (and I eliminate some of the 318 words) any committee of either House of Congress wilfully makes default shall be deemed guilty of a misdemeanor."

It will soon be your duty to determine the guilt or innocence of the defendant of the charges embraced in Counts 1, 6 and 7.

As I have said to you, it is my duty to instruct you as to the law applicable to the case, and that must govern you in your deliberations and in arriving at your conclusions. You are bound and obligated to follow the Court's instructions as to the law but you, the jury, are the sole judges of the facts, and you must determine the facts yourselves, solely on the basis of the evidence adduced before you.

If your recollection of the evidence differs in any respect from counsel for the Government, counsel for the defendant, or the Courts, then your recollection must prevail because the final decision on the facts is entirely within your province. My instructions are binding on you as to the law only.



The fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn against him from that fact, because the indictment is merely the machinery and the procedure that the law provides for bringing a defendant before the court and placing him on trial. That is the only function of  
 319 an indictment, and the indictment will be given to you for your consideration, and it may be taken with you to the jury room, but you realize always that the indictment is not evidence.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to a defendant throughout the trial.

The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt, and unless the Government sustains this burden and proves beyond a reasonable doubt that he committed the offense or offenses with which he is charged then you must find him not guilty.

But you may well ask, what is meant by the phrase "a reasonable doubt?" It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to an absolute or a mathematical certainty.

By "a reasonable doubt" as its name implies, is meant a doubt based on reason, and not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence.

Therefore, if after an impartial comparison and consideration of all of the evidence you can say candidly that you are not satisfied with the guilt of the defendant, then you have a reasonable doubt. But if after  
 320 such impartial consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important mat-

ters relating to your own affairs, then you have no reasonable doubt.

Evidence of good character, taken in conjunction with all the other evidence before you, may be sufficient to create in your minds a reasonable doubt, although without it the other evidence would be convincing.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh all the testimony of all of the witnesses who have testified before you. As I have said to you, you are the sole judges of the facts; necessarily, therefore, it follows that you are the sole judges of the credibility of the witnesses.

In determining whether to believe the testimony of any witness, or the defendant, and in weighing the testimony of any witness, whether that witness be for the Government or for the defendant, you may consider his demeanor on the stand; his manner of testifying; his interest in the outcome of the case; whether he impresses you as having an accurate memory and recollection; and whether he impresses you as a truth-telling individual.

Count 1 of the indictment charges the defendant

321 Rumely with contempt of Congress on June 6,

1950, in wilfully failing to produce records subpoenaed by the committee of the House of Representatives.

It is alleged that the House Select Committee on Lobbying Activities was conducting hearings pursuant to House Resolution 298 of the Eighty-first Congress, First Session. That in the course of this investigation the Lobbying Committee summoned the defendant by subpoena served on him on May 26, 1950, to produce before the committee records bearing on the matter under inquiry before the committee; that is, records of the Committee for Constitutional Government, Inc., showing, first, the name and address of each person from whom a total of \$1,000 or more had been received by the Committee

for Constitutional Government during the period from January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans; and second, as to each such person the amount, date, and purpose of each payment which formed a part of the total of \$1,000 or more.

It is further alleged that the defendant Rumely appeared before the Lobbying Committee on June 6, 1950, in the District of Columbia, but wilfully failed and refused to produce the record called for.

Count 6 of the indictment charges the defendant 322 Rumely with contempt of Congress on May 25, 1950, in wilfully failing to produce certain records subpoenaed by a committee of the House of Representatives.

It is alleged that the House Select Committee on Lobbying Activities was conducting hearings pursuant to the same House resolution already referred to; that in the course of this investigation the defendant Rumely, by subpoena served upon him on August 21, 1950, was summoned to produce records bearing on the matter under inquiry before the committee; that is, records of the Committee for Constitutional Government, Inc., showing-(a) the name and address of each person from whom a total of \$500 or more had been received by the said Committee during the period from January 1, 1947, to August 1, 1950, for any purpose, and (b) as to each such person, the amount, date and purpose of each payment which formed a part of the total of \$500 or more, and all correspondence relating to each such payment.

Count 6 further alleges that the defendant Rumely appeared before the Lobbying Committee on August 25, 1950, in the District of Columbia, but wilfully failed and refused to produce the record called for.

Count 7 of the indictment charges the defendant Rumely with contempt of Congress, also on August 25,

1950, in refusing to answer a question put to him by the Lobbying Committee which was then conducting  
 323 hearings, pursuant to House Resolution 298, and before which he was appearing as a witness; namely, who was the woman from Toledo who gave him \$2,000 for distribution of "The Road Ahead" which question was a question pertinent to the matter under inquiry.

The defendant, or defense, has not disputed that the papers purporting to be subpoenas were served upon him, but contend that such papers were not in fact proper subpoenas issued by authority of the committee of the House of Congress.

The Court instructs you, as a matter of law, that the ~~Select~~ Committee on Lobbying Activities of the House of Representatives was a validly constituted committee of Congress; that said committee had jurisdiction over the matters under consideration; that the records and information requested, as alleged in Counts 1 and 6, and the question asked, as alleged in Count 7, were pertinent thereto; that the committee had a reasonable basis for issuing the subpoenas in question.

The Court further instructs you, as a matter of law, that the papers alleged to have been served on the defendant constituted valid subpoenas.

I instruct you that you are not to concern yourselves with evidence ruled out by the Court nor to consider colloquies between opposing counsel, or between the Court and counsel, as none of those constitute evidence.

324 I further instruct you that the opening statements of counsel for the Government and for the defense, as well as their closing arguments, are not evidence in the case.

Your determination of the guilt or innocence of the defendant must be reached solely on the basis of the relevant evidence adduced at this trial, without any feelings of emotion, bias, or prejudice, without any anger



on the one hand and without any sympathy on the other. The nature of the activities of the defendant, or of the organization with which he was connected, is not an issue in this case. It is your duty entirely to disregard any speculation on that subject.

The issues which you are called upon to determine, and the basic elements of the offense with which the defendant is charged, have been and will be defined by the Court, and you should confine your consideration to them. It is incumbent upon the Government to prove each and all of the essential elements of the crime charged beyond a reasonable doubt.

Briefly, the elements of this offense, as applicable to Counts 1 and 6, are as follows; you will recall that they are the ones relating to the production of records:

As to the first element (1) that the chairman of the Select Committee on Lobbying Activities of the House of Representatives caused to be prepared a subpoena directing the defendant to appear before the committee and produce the records described to him; (2) that such subpoena was signed by the chairman of said committee and was served by a person designated by said chairman by placing same in the possession of the defendant; (3) that the defendant had custody or domain and control over the records in question; (4) that the defendant wilfully made default, that is, wilfully failed to produce one or more of the records called for by the subpoena.

The elements of the offense, as applicable to Count 7 of the indictment, are:

That the defendant Rumely appeared before the Select Committee on Lobbying Activities of the House of Representatives; that he was asked a question pertinent to the inquiry; that he wilfully refused to answer such question.

You are instructed as a matter of law that it makes no difference how many other records the defendant may



have produced, or how many other questions put by the committee the defendant may have answered, if he wilfully failed to produce any of the records called for by the subpoenas, or wilfully refused to answer any pertinent question asked.

Several times during this charge I have used the term "wilful" or "wilfully." "Wilful" as used in Title 2, Section 192, of the United States Code, means deliberate and intentional and not inadvertent or accidental.

326 Thus the motive of the defendant in failing to comply with the subpoena, and his reason for such failure, or his reason for refusing to answer any question, are not material so long as you find that he did so intentionally and deliberately. The word "wilful" does not mean that the failure or refusal to comply with the committee's order or refusal to answer a question must necessarily have been for an evil or a bad purpose. The reason or purpose of the failure to comply or refusal to comply is immaterial, whether it is done in good faith or bad faith, so long as the refusal is deliberate and intentional and is not a mere advertence or an accident.

Even if a person believes that he has a legal right to refuse to produce documents, or to refuse to answer questions, if that belief is erroneous this circumstance would be immaterial, for one decides at his own peril what his legal duties are.

You are further instructed that the fact that the defendant may have acted pursuant to advice of his attorney, or others, would not be justification for his refusal to comply with the subpoenas or his refusal to answer.

You are further instructed, as a matter of law, that if you find that the defendant refused to comply with either one or both of the subpoenas to produce, on the ground that they were unreasonable and unduly burdensome in their demands, but at the same time also refused

327 compliance for other reasons, so that it would have been useless for the committee to have amended such subpoena or subpoenas to make them more reasonable or less burdensome, the defendant having refused to produce the desired records on other grounds, then the fact that the subpoena, or subpoenas, were unreasonable or unduly burdensome, if you should so find, would not excuse the defendant's refusal to comply with them.

The charge in this indictment, although sometimes referred to as contempt, does not mean a personal animosity or dislike toward the congressional committee or any of its members. The charge consists of the elements as I have defined them to you.

If you believe the prosecution has proved beyond a reasonable doubt each and all of the elements as outlined and explained to you by the Court, then you may find the defendant guilty.

If on the other hand you believe the Government has not proved beyond a reasonable doubt each and all of the elements outlined and explained to you by the Court, then you must find the defendant not guilty.

Your verdict may be guilty or not guilty as to one or more or as to all of Counts 1, 6 and 7.

I repeat to you, possibly unnecessarily, that the only counts which you have for your consideration are Counts 1, 6 and 7.

328 You will render a reparate verdict as to Count 1, Count 6, and Count 7. Your verdict, as I have said, will be guilty or not guilty as to each of the counts.

You, of course, by this time realize that your verdict in the case must be unanimous.

MR. MAHER: Your Honor, I would like to except to a few phases of the charge.

THE COURT: Yes, sir.

MR. MAHER: I don't feel that the Court has properly charged the jury with respect to impossibility to perform.

In effect, what the Court has told the jury is that the reason for the failure to produce is immaterial, so long as it was not due to accident or inadvertence.

I think the Court should properly charge the jury, as suggested by the defendant's prayers 3 and 4, that even though he intended not to produce the records, if it were impossible for him to produce them, physically impossible; then their verdict should be not guilty.

I think there is enough evidence in here to justify that charge.

329 THE COURT: Will you read that?

THE REPORTER (reading):

"I think the Court should properly charge the jury, as suggested by the defendant's prayers 3 and 4, that even though he intended not to produce the records, if it were impossible for him to produce them, physically impossible, then their verdict should be not guilty."

MR. MAHER: With respect to character testimony, Your Honor, I don't think you adequately charged on that.

I think the charge should be that the circumstances of the case may be such that character testimony, standing alone, may be sufficient to form a reasonable doubt, even though without it the evidence would be clearly convincing.

THE COURT: What I gave is what I gave in the Barsky case, and that is the specific one that went to the Supreme Court.

MR. MAHER: Of course there is the exception to the charge of the definition of "wilful."

Do you have anything further, Mr. Burkinshaw?

MR. BURKINSHAW: I have nothing further.

THE COURT: Have you anything further, Mr. Hitz?

MR. HITZ: Through an inadvertence you referred to Count 6 as being alleged as an offense in May, on May 25, and it should be August 25.

330 THE COURT: All right; I will correct that.

MR. HITZ: Then one further thing. Under Count 7, which is the question count, you stated that the element there would be his appearance before the committee. With reference to how he got there, I think it would be helpful to the jury if that was expanded to say that it is not grounded upon the issuance of the service of any subpoena, but that his appearance there and in the capacity of the question you have judged it to be pertinent.

THE COURT: I think I will let them stand.

There is no objection to correcting my error as to the date?

MR. BURKINSHAW: No objection as to that.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court:)

THE COURT: Counsel called my attention to the fact that when I recited the substance of Count 6 I gave a date other than the correct date. The correct date is August 25, 1950. I, of course, stand corrected, and you will observe that when you get the indictment to take with you to the jury room.

If there be nothing further, ladies and gentlemen of the jury, as to the first twelve—the other two jurors will remain seated when the other twelve pass out, 331 your function in this case having been served, namely, you were to be present for use in the event something happened to the first twelve we called—but as to the twelve jurors, it now becomes your duty to retire to the jury room, select your foreman, consider and decide the case.

You, of course, realize that your verdict must be unanimous. Your verdict will be guilty or not guilty as to

Count 1; guilty or not guilty as to Count 6, and guilty or not guilty as to Count 7.

You may now retire and consider and decide the case.

THE DEPUTY COURT CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: We have.

THE DEPUTY COURT CLERK: What say you as to Edward A. Rumely on Count 1?

332 THE FOREMAN: Guilty as charged.

THE DEPUTY COURT CLERK: What say you as to Edward A. Rumely on Count 6?

THE FOREMAN: Guilty as charged.

THE DEPUTY COURT CLERK: What say you as to Edward A. Rumely on Count 7?

THE FOREMAN: Guilty as charged.

THE DEPUTY COURT CLERK: Members of the jury, your foreman says your verdict in this case is a verdict of guilty on each of the three counts, Count 1, Count 6, and Count 7, and that is your verdict so say you each and all.

(The jurors say, "It is.")



Filed Jun 5 1951 Harry M. Hull, Clerk

*Deft. Ex. #1*

April 6, 1951

Clerk of the House of Representatives  
House Office Building  
Washington, D.C.

Dear Sir:

Herewith, in triplicate, the new form of report, pursuant to Federal Regulation of Lobbying Act, which I am filing with you under the instructions of the trustees of the Committee for Constitutional Government, Inc., by which I am employed.

The attached report covers the quarter ending March 31, 1951.

I am not employed to support or oppose any legislation whatsoever. For this reason and the reasons set forth in my letters to you under previous dates, I protest that I am not under any legal obligation to file reports under said Act, and again request ruling on this question for future guidance.

Sincerely yours,

Edward A. Rumely  
Executive Secretary

EAR:DP  
ENC.

Filed Jun 5 1951 Harry M. Hull, Clerk

*Deft. Ex. # 2*

OFFICE OF THE CLERK  
HOUSE OF REPRESENTATIVES  
Washington, D. C.

October 8, 1946

Dr. Willford I. King  
Chairman and President  
Committee for Constitutional Government, Inc.  
205 East 42nd Street  
New York 17, New York

Dear Sir:

There is herewith your official receipt, acknowledging the quarterly statement of the Committee for Constitutional Government, Inc., filed in this office pursuant to the Federal Regulation of Lobbying Act.

Receipt of your letter of October 4, together with accompanying memorandum which I have noted, is hereby acknowledged.

The provisions of this Act appear to be quite clear as to its intention. There remains only the possession of detailed knowledge as to the activities of a person (which as defined by the Act "includes an individual, partnership, committee, association, corporation, and any other organization or group of persons") in order to apply the tests very specifically set forth in the Act. It is the opinion of this office that such a determination should be made by the person who believes he may come within the purview of this law, and that the Clerk of the House should not make such a decision for him.

For your more complete information, additional copies of the forms developed by this office to assist persons in complying with its provisions are herewith. These forms, by their very nature, tend to simplify the process of understanding the application of this law.

Very truly yours,

/s/ South Trimble

**SOUTH TRIMBLE**

Clerk of the House of  
Representatives

Filed Jun 6 1951 Harry M. Hull, Clerk

Deft. Ex. # 3

**A. ORGANIZATION OR INDIVIDUAL FILING**

1. State name, address and nature of business.

*Edward A. Rumely*

*Committee for Constitutional Government, Inc.*

*205 East 42nd Street, New York 17, New York*  
*Educational*

2. If this Report is for an Employer, list names of agents or employees who will file Reports for this Quarter.

**B. EMPLOYER—State name, address, and nature of business. If there is no employer, write "None."**

*Committee for Constitutional Government, Inc.*

*205 East 42nd Street*

*New York 17, New York*

*Educational*

*non-profit, non-partisan*

C. LEGISLATIVE INTERESTS, AND PUBLICATIONS in connection therewith:

See Committee report. As Executive Secretary of the Committee for Constitutional Government, Inc., my sole function is to carry out the policies and programs laid down by its trustees, in accordance with the Committee's objectives and powers as set forth in its Certificate of Incorporation. These duties include the initiation of mailings to supporters and citizens, the distribution of press releases, etc. upholding the principles of private enterprise and constitutional government, in accordance with the Committee's basic program.

Subscribed and sworn to before me on April 6, 1951

Filed Jun 5 1951 Harry M. Hull, Clerk

Deft. Ex. # 4

Name *Edward A. Rumely*

Business Address *205 East 42nd Street, New York City*

Employed by *Committee for Constitutional Government, Inc.*

Address *205 East 42nd Street, New York City*

(1) A detailed report under oath of all money received and expended by him during the preceding calendar quarter:

(1) *I receive my salary, commissions and expenses, as reported on earlier Form B. The corporation has reported its disbursements separately on Form A.*

(4) The names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials:

(4) *We never pay to have news articles printed but issue press releases, some of which are reprinted, and of these I have no record.*

(5) The proposed legislation he is employed to support or oppose:

(5) *I am not employed for the purpose of supporting or opposing legislation. Sometimes, the Committee trustees take a stand for or against an issue (on legislation) where they think a constitutional principle is involved. Then I distribute educational material on the question.*

. . . . .

Subscribed and sworn to (affirmed) before me this 9th day of January, A. D. 1950

Filed Jun 5 1951 Harry M. Hull, Clerk

Deft. Ex. # 5

January 9, 1950

The Clerk  
The House of Representatives  
House Office Bldg.  
Washington, D. C.

Dear Sir:

Herewith Form C, in duplicate, which I am filing with you pursuant to the requirements of Title III, Regulations of Lobbying Act, under the instructions of the trustees of the Committee for Constitutional Government, Inc., by which I am employed.

The attached data cover the quarter ending December 31, 1949.



I am not employed to support or oppose any legislation whatsoever. For this and the reasons set forth in my letters to you under previous dates, I protest that I am not under any legal obligation to file reports under said Act, and again request a ruling on this question for future guidance.

Sincerely yours,

Edward A. Rumely  
Exec. Sec'y

EAR:DP  
ENC

Filed Jun 14 1951 Harry M. Hull, Clerk

Govt. Ex. # 1

H. Res. 2

In the House of Representatives, U. S.,

January 3, 1949.

Resolved, That a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled; that Sam Rayburn, a Representative from the State of Texas, has been elected Speaker; and Ralph R. Roberts, a citizen of the State of Indiana, Clerk of the House of Representatives of the Eighty-first Congress.

Attest:

/s/ Ralph R. Roberts  
Clerk

(SEAL)

Filed Jun 14 1951 Harry M. Hull, Clerk

*Govt./Ex. # 2*

H. Res. 298

In the House of Representatives, U. S.,

August 12, 1949.

Resolved, That there is hereby created a Select Committee on Lobbying Activities to be composed of seven Members of the House of Representatives to be appointed by the Speaker, one of whom he shall designate as chairman. Any vacancy occurring in the membership of the committee shall be filled in the manner in which the original appointment was made.

The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation.

The committee may from time to time submit to the House such preliminary reports as it deems advisable; and prior to the close of the present Congress shall submit to the House its final report on the results of its study and investigation, together with such recommendations as it deems advisable. Any report submitted when the House is not in session may be filed with the Clerk of the House.

For the purposes of this resolution the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the

signature of the chairman of the committee or any Member designated by him, and may be served by any person designated by such chairman or Member. The chairman of the committee or any Member thereof may administer oaths to witnesses.

Attest:

/s/ Ralph R. Roberts  
Clerk.

(SEAL)

Govt. Ex. # 5

BY AUTHORITY OF THE HOUSE OF REPRESENTA-  
TIVES OF THE CONGRESS OF THE UNITED  
STATES OF AMERICA

To: Benedict F. FitzGerald.

You are hereby commanded to summon Edward A. Rumely, Committee for Constitutional Government, Inc., 205 East Forty-second Street, New York, N. Y., to be and appear before the Select Committee on Lobbying Activities of the House of Representatives of the United States, of which the Honorable Frank Buchanan is chairman, and to bring with him such of the records of said committee as indicated:

(1) The name and address of each person<sup>1</sup> from whom a total of \$1,000 or more has been received by the committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans;

(2) as to each such person<sup>1</sup> the amount, date, and purpose of each payment which formed a part of the total

<sup>1</sup> Includes any individual, partnership, corporation, association, or other organization or group.

of \$1,000 or more, in their chamber in the city of Washington; on Tuesday, June 6, 1950, room 362, Old House Office Building, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 25th day of May 1950.

Frank Buchanan, Chairman

[SEAL]

Attest:

Ralph R. Roberts, Clerk.

Served on Edward A. Rumely at the offices of the Committee for Constitutional Government, Inc., 205 East Forty-second Street, New York City, on Friday, May 26, 1950, at about 5 p. m. by delivery in hand to the said Edward A. Rumely, by the undersigned.

Benedict F. FitzGerald, Jr.  
Counsel, House Select  
Committee on Lobbying  
Activities.

*Govt. Ex. # 6*

BY AUTHORITY OF THE HOUSE OF REPRESENTA-  
TIVES OF THE CONGRESS OF THE UNITED  
STATES OF AMERICA.

To Wm. Earl Griffin:

You are hereby commanded to summon Edward A. Rumely, Executive Secretary, Committee for Constitutional Government, Inc., 205 East 42nd St., New York City, N. Y.,

to be and appear before the Select Committee on Lobbying Activities of the House of Representatives of the United States, of which the Hon. Frank Buchanan is chairman, and to bring with him the following documents in his custody (see Annex) relating to—

(a) The organization and finances of the Committee for Constitutional Government, Inc., and

(b) The activities of the Committee for Constitutional Government, Inc., its members, officers, directors, representatives, agents, and employees pertaining to legislation, in their chamber, Room 362, Old House Office Building, in the city of Washington, on Friday, August 25, 1950, at the hour of 10, then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 21st day of August 1950.

Frank Buchanan

Frank Buchanan, Chairman.

Ralph R. Roberts, Clerk

[SEAL]

Attest:

*Subpoena Annex—Committee for Constitutional Government*

1. Such of the records of the Committee as indicate:

(a) the name and address of each person<sup>1</sup> from whom a total of \$500 or more has been received by the Committee during the period from January 1, 1947 to August 1, 1950 for any purpose.

<sup>1</sup> The term "person" as here and hereinafter used throughout this subpoena includes an individual, partnership, corporation, association, committee and any other organization or group of persons.



(b) as to each such person,<sup>1</sup> the amount, date and purpose of each payment which formed a part of the total of \$500 or more, and all correspondence<sup>2</sup> relating to each such payment.

2. Each monthly statement for each bank account maintained by the Committee at any time between January 1, 1947 and August 1, 1950, including but not limited to the following:

a. at the National City Bank, East Midtown Branch, accounts denominated Deposit Account "C"; Disbursing Account "C"; Deposit Account "I"; Disbursing Account "I"; General Fund Account "A".

b. Accounts in Knoxville, Tennessee.

c. Accounts in Nashville, Tennessee.

d. Accounts in Memphis, Tennessee.

e. Accounts in Chattanooga, Tennessee.

3. Each check drawn on each such account referred to in paragraph 2 which has returned to the possession of the Committee.

As to all documents called for in this subpoena, carbon, photostat or recordak copies should be produced in the event that original documents are not in the possession of the Committee.

<sup>1</sup> The term "correspondence" means letters, telegrams, memoranda, and transcripts or memoranda of telephone conversations.

Wednesday, December 5, 1951

Before HONORABLE E. BARRETT PRETTYMAN, JAMES M. PROCTOR and  
DAVID L. BAZELON, Circuit Judges

No. 11,066

EDWARD A. RUMELY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argument was commenced by Mr. Donald R. Richberg, attorney for appellant, at 10:34; continued by Mr. William Hitz, attorney for appellee, at 11:17; continued by Mr. Richberg, attorney for appellant, at 12:04; concluded by Mr. Hitz, attorney for appellee at 12:10 to 12:12.

United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 29, 1952. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 11066

EDWARD A. RUMELY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided April 29, 1952

Mr. Donald R. Richberg, with whom Messrs. Alfons Landa and Delmar W. Holloman were on brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Mr. Charles M. Irelan, United States Attorney at the time the brief was filed, was on the brief, for appellee. Mr. George Morris Fay, United States Attorney at the time the record was filed, and Mr. Joseph M. Howard, Assistant United States Attorney, also entered appearances for appellee.

Before PRETTYMAN, BROCTOR and BAZELON, Circuit Judges

PRETTYMAN, *Circuit Judge*: This is an appeal from a judgment of conviction upon three counts of an indictment. The three counts read, in pertinent part, as follows:

*Count One*

"Defendant Edward A. Rumely, by subpoena served upon him on May 26, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (1) the name and address of each person from whom a total of \$1,000 or more has been received by the Committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans; (2) as to each such person from whom a total of \$1,000 or more has been received formed a part of the total of \$1,000 or more. Defendant Rumely appeared before the said Committee on June 6, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default."

*Count Six*

"Defendant Edward A. Rumely, by subpoena served upon him on August 21, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (a) the name and address of each person from whom a total of \$500 or more has been received by the said Committee during the period from January 1, 1947, to August 1, 1950, for any purpose, and (b) as to each such person, the amount, date and purpose of each payment which formed a part of the total of \$500 or more, and all correspondence relating to each such payment. Defendant Rumely appeared before the said Committee on August 25, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default."

*Count Seven*

"Defendant Edward A. Rumely appeared as a witness before the said Committee at the place and on the date above stated and refused to answer a question put to him by the Committee, namely, who was the woman from Toledo who gave him \$2000 for distribution of 'The Road Ahead,' which question was a question pertinent to the question under inquiry."

The offenses thus charged were alleged to be violation of the statute which reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of (not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months." <sup>1</sup>

The Select Committee on Lobbying Activities, generally known as the Select Committee or the Buchanan Committee, was created on August 12, 1949, by the House of Representatives of the United States by a Resolution <sup>2</sup> which, in pertinent part, reads as follows:

"The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

Appellant is the Executive Secretary of an organization known as the Committee for Constitutional Government, Inc., incorporated in 1941 as a successor to an unincorporated Committee formed in 1937. Under instructions of the Committee's trustees he filed in 1946 with the Clerk of the House of Representatives a report, pursuant to the Regulation of Lobbying Act, <sup>3</sup> accompanied by a

<sup>1</sup> 52 STAT. 942 (1938), 2 U. S. C. A. § 192.

<sup>2</sup> H. R. RES. 298, 81st. Cong., 1st. Sess.

<sup>3</sup> 60 STAT. 839 (1946), 2 U. S. C. A. §§ 261-270.



letter, and thereafter until early 1951 he filed similar reports and letters. One of these letters, in language like that of the others, read in part:

"I am not employed to support or oppose any legislation whatsoever. For this reason and the reasons set forth in my letters to you under previous dates, I protest that I am not under any legal obligation to file reports under said Act, and again request ruling on this question for future guidance."

The Committee for Constitutional Government, Inc., publishes and distributes books and pamphlets, usually pertaining to national affairs and issues. The Report of the Buchanan Committee to the House<sup>4</sup> indicates that the concern distributed, among other things, some 750,000 copies of "The Road Ahead", a book by John T. Flynn, 25,000 copies of "Labor Monopolies and Freedom", a book by John W. Scoville, 130,000 copies of "Compulsory Medical Care and the Welfare State" by Melchior Palyi, about 600,000 copies of the "Constitution of the United States" by Thomas James Norton, thousands of "Why the Taft-Hartley Law" by Irving G. McCann, and millions of engrossed copies of the Bill of Rights to schools and colleges. Rumely testified before the Committee that about 85 per cent of the books were sold in lots of from one to twenty copies and the remainder in bulk sales. Bulk sales took three forms: (1) The purchaser bought the books and distributed them; (2) the purchaser furnished a list of people to whom he wished the books sent, and Rumely's office made the distribution; (3) the purchaser designated in general terms the distributees, such, for example, as 15,000 libraries or 15,000 editors, and Rumely's office made the distribution to a list of names in that category in its files.

Rumely testified, according to the Report of the Committee, that he and his associates do not come down to Congress, that "Our lobbying consists of going out with a viewpoint to the country, and informing people and letting the people talk to their Members of the Congress." Upon occasion copies of a book or pamphlet are distributed to all members of Congress. For example, Rumely said that a purchaser of "Labor Monopolies or Freedom" directed distribution to "every newspaperman" in the United States and

<sup>4</sup> H. R. REP. NO. 3024, 81st Cong., 2d Sess. (1950). The transcript of the hearings before the Buchanan Committee is not in this record, except in so far as excerpts were included in the Report to the House (Gov't Ex. 4) or read to the jury. H. R. REP. NO. 3239, another report of the Buchanan Committee, is not in this record.



also to all Congressmen. The record before us contains no contradiction of that testimony or any different description of the activities of the organization.

In the course of its investigations the Buchanan Committee served upon appellant two subpoenas, one on May 26, 1950, and the other on August 21, 1950. The nature and extent of the subpoenas are indicated in the first and sixth counts of the indictment, quoted in pertinent part above. Sometime in May investigators for the Buchanan Committee appeared at Rumely's office and submitted to him a list of material, in twenty-six items, concerning which the Buchanan Committee desired information. The twenty-sixth item called for the names of all purchasers of books or pamphlets. After some discussion Rumely gave the investigators access to all records, etc., for all purposes except the twenty-sixth item. Pursuant to the first subpoena Rumely appeared before the Committee on June 6, 27, 28 and 29, 1950. On June 28th Rumely told the Committee, "I am perfectly willing to give everything except one thing. I haven't withheld anything, except the names of the buyers of our books. Those, you can't have." He repeated many times in the course of those hearings that he declined to give any names of people who bought books from his company. On June 29th he told the Committee:

"I certainly refuse to disclose those names—not contemptuously, but respectfully, because I feel it is my duty to uphold the fundamental principles of the Bill of Rights. I think that there is no power to require of a publisher the names of the people who buy his products, and that you are exceeding your right."

The August 21st subpoena, reflected in Count Six of the indictment, called for more material than did the May 26th one, and it required Rumely to appear on August 25th. He appeared and stated that he had brought the material "As far as it was physically possible." He insisted that full compliance was "an impossible thing." He stated, for example, that the investigator had asked for each of the returned checks drawn on the National City Bank in 37 months, that he had put four men to work on that item, and that in 43½ hours they had been able to assemble the checks for only one month. On this appearance Rumely repeated his refusal to give the names of the purchasers of books.

Concerning the transaction which was the basis for Count Seven of the indictment, Rumely testified both before the Buchanan Committee and upon the trial that his Committee had outstanding a general offer to sell copies of the book "The Road Ahead" in bulk at fifty cents a copy. A "woman from Toledo" sent a check

for \$2,000 and requested that 4,000 copies of the book be distributed to school teachers and clergymen in Toledo, as shown on a list which she furnished. Rumely refused to tell the Buchanan Committee the name of this woman.

In its Report to the House the Buchanan Committee said:

"Our study of this organization indicates very clearly that its most important function is the distribution of books and pamphlets in order to influence legislation directly and indirectly. It attempts to influence legislation directly by sending copies of books, pamphlets, and other printed materials to Members of Congress. It attempts to influence legislation indirectly by distributing hundreds of thousands of copies of these printed materials to people throughout the United States.

"The distribution of printed material to influence legislation indirectly by influencing public opinion is the basic function of the Committee for Constitutional Government: . . ."

And again the Committee said:

"These leaflets and memoranda, coupled with the books themselves, are evidence that their distribution by the Committee for Constitutional Government, Inc., constitutes an attempt by that organization to influence legislation, directly or indirectly."

The following colloquy occurred between Rumely and counsel for the Committee and typifies the nature of the hearing:

"Mr. RUMELY. The Road Ahead, I have told you all along, we put out 600,000. I am not going to give you the names of the people who bought it. . .

"Mr. FITZGERALD. Don't you feel The Road Ahead deals with specific legislation?

"Mr. RUMELY. The Road Ahead deals with stopping the march into socialism and the destruction of our form of government.

"Mr. FITZGERALD. I think that the true significance of The Road Ahead can be obtained only by reading it in its entirety, and I respectfully suggest that the committee read it. It condemns practically all of the social legislation which has been passed by the Roosevelt and Truman administrations, and opposes practically all of the present legislative program of President Truman. However, it does deal with specific legislation from time to time.

"For example, it deals with the war powers. On page 158 it states: 'We must curb the grasping hand of the Federal Government. We must restrain the grasping hand of the Executive. And our very first step must be to make a list of the emergency powers granted to the Executive for war purposes and then repeal every one of them.'"

In its Report the Committee also suggested that refusal to submit pertinent financial records might cover subterfuges to evade the Federal Regulation of Lobbying Act, i.e., to mask contributions as purchases. We shall discuss that suggestion in a moment.

The trial of Rumely was a comparatively simple proceeding. The prosecutor presented evidence that Rumely had registered under the Lobbying Act, that the Committee had been created by Resolution, and that the subpoenas had been served. He verified certain extracts (from pages 17, 18, 19, 20, 126, 166, 271, 272 and 273) from the transcript of the Committee hearings, which showed that Rumely refused to give the names and addresses of purchasers of books. He presented a certified copy of the Report of the Committee to the House. The defense presented Rumely and four character witnesses. Rumely described his efforts to comply with the subpoenas and verified his refusal to give the names of the purchasers of the books. Counsel for the defense made a detailed and extensive proffer of evidence, which was excluded from the jury by the court but accepted in part for the court itself on the question of pertinency. On cross examination Rumely asserted some half dozen times that he refused to give the names of purchasers of books.

The theory of the prosecution, adopted as correct by the court, was that, so long as Rumely refused to give a part of the subpoenaed data, all else was immaterial. The court instructed the jury that the Buchanan Committee was validly constituted and had jurisdiction over the matters under consideration; that the records subpoenaed were pertinent; that the Committee had a reasonable basis for issuing the subpoenas; that the subpoenas were validly issued; and that it made no difference what records were supplied so long as some were not supplied.

We turn first to that portion of the Buchanan Committee's Report which suggests that the Committee was seeking to ascertain whether subterfuges were being used to evade the Lobbying Act. It is clear to us that the point is not in the case as it was tried and as it is here. The statement of the Committee was that "Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine" whether the Lobbying Act requires amendment to prevent subterfuges. But, as the case comes to us, there was no

refusal to produce financial records. Over and over again Rumely asserted before the Committee that he had given, and was willing to give, all records except the names and addresses of the purchasers of the books. No contention was made at those hearings that he refused to give anything else. Upon the trial the prosecutor did not say that anything else was refused. On the contrary, he urged a different view. He insisted, and the court sustained his view, that, so long as the names of purchasers of books were not given, financial records on contributions and loans were immaterial to the issues in the case. But they could not be immaterial if the issue was the inability of the Committee to probe subterfuges "Because of the refusal of [Rumely] to produce pertinent financial records". The Government did not rest this case upon that premise. The pertinency of the question which Rumely refused to answer was a contested issue upon the trial. The prosecutor's contention was that pertinency was established when it was shown that Rumely had registered as a lobbyist. Certainly, if the pertinency of the question rested even in part upon the Committee's desire to probe into possible subterfuges, the financial records would have been relevant and material. The prosecutor urged and the court held that the financial data was inadmissible.

It is now said that contributions might be disguised by being made in the form of purchases of books. It is difficult to see how the purchase of a book at a dollar could be a contribution if it cost a dollar to produce the book. If the sales prices of the books exceeded the production costs in such amounts as to result in sizable profits, that fact would show in the financial records; the names of the purchasers would shed no light on that problem. No suggestion of this sort was made upon the trial or in the briefs before us.

It is said that the names of the purchasers of the books were pertinent, since the Committee might wish to question those persons as to possible subterfuges. That pertinency was too remote on this record to sustain an abridgment of the freedoms of speech and press. Subterfuges would appear, as the Committee itself evidently thought, upon examination of the financial records. Those records were not even admitted in evidence. Had they been admitted, and had they been suspected of being false, some further inquiry might have been in order. But no such issue was raised in this case. On a record such as this, so slim a semblance of pertinency is not enough to justify inquisition violative of the First Amendment. We are also of opinion that, even if the purchases were really contributions but were merely in furtherance of an effort to influence public opinion, they were beyond the power of the Congress and of the Committee under its Resolution, a subject which we shall discuss in a moment. No mention of a purpose to probe disguised contributions appears in the Government's brief before us.



The view of the Buchanan Committee, as reflected in such portions of its hearings as are before us, and that of the prosecutor, the trial court, and the Government in its brief and argument here, is that the publication of books upon national issues is indirect lobbying, that sending books and bulletins to Congressmen is direct lobbying, and that the Buchanan Committee had authority to investigate lobbying, direct and indirect. That is the controversy before us, as we see it.

Appellant presents two principal contentions. He insists that the Buchanan Committee had no power to require him to produce or to reveal the names of purchasers of books, on two grounds, (1) that the Congress had no constitutional power to make that inquiry and (2) that the House had not by its Resolution empowered the Committee to make that inquiry. Both contentions were available to him.<sup>5</sup>

We begin this consideration with basic premises. To attempt to influence public opinion upon national affairs by books, pamphlets and other writings is one of the fundamental freedoms of speech and press. Congress has no power to abridge those freedoms unless urgent necessities in the public interest require it to do so. We examined this matter at length in *Barsky v. United States*.<sup>6</sup> In that case it was shown that the President and other responsible Government officials had, with supporting evidentiary data, represented to the Congress that Communism and the Communists are, in the current world situation, potential threats to the security of this country. For that reason, and for that reason alone, we held that Congress had the power, and a duty, to inquire into Communism and the Communists.<sup>7</sup> The doctrine has since been

<sup>5</sup> *McGrain v. Daugherty*, 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319 (1927).

<sup>6</sup> 83 U. S. App. D. C. 127, 167 F. 2d 241 (1948), *cert. denied*, 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511 (1948).

<sup>7</sup> The decisions of this court in *Dennis v. United States*, 84 U. S. App. D. C. 31, 171 F. 2d 986 (1948), *aff'd*, 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519 (1950); *Lawson v. United States*, 85 U. S. App. D. C. 167, 176 F. 2d 49 (1949), *cert. denied*, 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663 (1950); *Morford v. United States*, 85 U. S. App. D. C. 172, 176 F. 2d 54 (1949), *rev'd on other grounds*, 339 U. S. 258, 94 L. Ed. 815, 70 S. Ct. 586 (1950), 87 U. S. App. D. C. 256, 184 F. 2d 864 (1950), *cert. denied*, 340 U. S. 878, 95 L. Ed. 638, 71 S. Ct. 120 (1950); and *Marshall v. United States*, 85 U. S. App. D. C. 184, 176 F. 2d 473 (1949), *cert. denied*, 339 U. S. 933, 94 L. Ed. 1352, 70 S. Ct. 663 (1950), rested upon the same necessities of national security.



clarified and sharpened by the Supreme Court.<sup>8</sup> At the same time, the Supreme Court by numerous expressions, both before and after the *Barsky* decision, has made clear the inviolability of the fundamental freedoms in the absence of some such public necessity.<sup>9</sup>

That Congress has no power in respect to efforts to influence public opinion rests upon two bases. First, Congress is a representative body. It represents the people, and its power comes from the people. It is not a source or a generator of power; it is a recipient and user of power. As a representative it has no inherent authority to interfere with the thought or wishes of its principal, and the people have not conferred that authority upon their representative, the Congress. So that, even if there were no prohibition such as the First Amendment in the Constitution, Congress would lack authority to abridge either public opinion or efforts to influence that opinion. Second, the First Amendment is a direct prohibition upon the Congress. It reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Congress cannot legislate concerning "all activities intended to influence, encourage, promote, or retard legislation", or activities designed in the language of the Buchanan Committee, "to influence legislation indirectly by influencing public opinion". If Congress had authorized its Committee to inquire generally into attempts to influence public opinion upon national affairs by books, pamphlets, and other writings, its authorization would have been void.

To publicize or to report to the Congress the names and addresses of purchasers of books, pamphlets and periodicals is a realistic interference with the publication and sale of those writings. This is another problem which we examined in the *Barsky* case, *supra*.

<sup>8</sup> Compare *Dennis v. United States*, 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857 (1951), *Communications Ass'n v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674 (1950), and *Adler v. Board of Education*, 342 U. S. 485 (1952), with *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943).

<sup>9</sup> *Stromberg v. California*, 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931); *Near v. Minnesota*, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Grösjean v. American Press Co.*, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936); *De Jonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937); *Schneider v. State*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939); *Niemotko v. Maryland*, 340 U. S. 268, 95 L. Ed. 267, 71 S. Ct. 325 (1951), and *Kunz v. New York*, 340 U. S. 290, 95 L. Ed. 280, 71 S. Ct. 312 (1951), and cases cited therein.

and we there held that the public inquiry there involved was an impingement upon free speech. We are of the same view here. There can be no doubt, in that case or in this one, that the realistic effect of public embarrassment is a powerful interference with the free expression of views. In that case the tenets of Communism and the apparent nature of the Communist Party created a public necessity for congressional inquiry. In the case at bar no such dangerous factors are represented to us. There is no suggestion that the publication or distribution of these books and documents constitutes any public danger, clear or otherwise, present or otherwise.

In support of the power of Congress it is argued that lobbying is within the regulatory power of Congress; that influence upon public opinion is indirect lobbying, since public opinion affects legislation; and that therefore attempts to influence public opinion are subject to regulation by the Congress. Lobbying, properly defined, is subject to control by the Congress, a matter we shall discuss in a moment. But the term cannot be expanded by mere definition so as to include forbidden subjects. Neither semantics nor syllogisms can break down the barrier which protects the freedom of people to attempt to influence other people by books and other public writings. Such logic as the contention possesses falls before the realities of the protected freedoms.

It is said that lobbying itself is an evil and a danger. We agree that lobbying by personal contact may be an evil and a potential danger to the best in legislative processes. It is said that indirect lobbying by the pressure of public opinion on the Congress is an evil and a danger. That is not an evil; it is a good, the healthy essence of the democratic process. It is said that the financing of extensive efforts to influence public opinion is an evil and a danger. As to that, generalities are inaccurate. If influences upon public opinion were being bought and prostituted, an evil might arise. But the case before us concerns the public distribution of books and the formation of public opinion through the processes of information and persuasion. There is no evil or danger in that process. To fail to recognize the difference between that which threatens the national security and that which is, or may be, merely evil is to fail to recognize realities.

With these considerations in mind we turn to the House Resolution which was the authority of the Buchanan Committee. The House of Representatives did not purport to confer upon the Buchanan Committee power to investigate all activities intended to influence, encourage, promote or retard legislation. The Resolution of authority limited the Committee's inquiries to "lobbying" activities. "Lobbying" is a word of common meaning. The verb

"lobby" means, according to the Oxford English Dictionary (1933), "To influence (members of a house of legislature) in the exercise of their legislative functions by frequenting the lobby. Also, to procure the passing of (a measure) *through* Congress by means of such influence." Other dictionaries give similar meanings. The Supreme Court discussed a contract for "lobby service" in *Trist v. Child*<sup>10</sup> and used the term "personal solicitation" as descriptive of it. "A lobbyist", said the Circuit Court in *Burke v. Wood*,<sup>11</sup> "is defined to be one who frequents the lobby or the precincts of a Legislature or other deliberative assembly with the view of influencing the views of its members." In the past a difference between lobbying and "purely professional services" in acquainting a legislature with the merits or demerits of measures was recognized at the law. The Supreme Court discussed it in *Trist v. Child*, *supra*, and in *Marshall v. Baltimore & Ohio R. R.*,<sup>12</sup> both of which cases it discussed in *Oscanyan v. W. R. Arms Co.*<sup>13</sup> Similar discussion appears in *Lucas v. Wofford*,<sup>14</sup> *Ewing v. National Airport Corporation*,<sup>15</sup> and *Noonan v. Gilbert*.<sup>16</sup> It may be that the line between lobbying in its pristine sense and proper professional service is too shadowy to serve as a limiting barrier to the regulatory power of the Congress. We do not have that question here, and, however that may be, Congress was certainly aware of the common meaning of the words "lobbying activities" when it used them in conferring authority upon the Buchanan Committee. At the most, the words depict no more than representations made directly to the Congress, its members, or its committees.

Lobbying, as thus or similarly defined, is within the regulatory power of the Congress and the terms of the Resolution. The influencing of legislative processes by contacts with legislators is potentially, although by no means necessarily or universally, a danger to the free and proper exercise of the legislators' functions. As such it is subject to inquiry by the legislature and to protective restrictions. Congress has a duty to protect the free flow from the people of influence, encouragement, promotion and retardation of legislative matters. So Congress has the right to restrict "lobbying"

<sup>10</sup> 21 Wall (88 U.S.) 441, 22 L. Ed. 623 (1875).

<sup>11</sup> 162 Fed. 533, 537 (S. D. Ala. 1908).

<sup>12</sup> 16 How. (57 U.S.) 314, 14 L. Ed. 953 (1853).

<sup>13</sup> 103 U. S. 261, 26 L. Ed. 539 (1881).

<sup>14</sup> 49 F. 2d 1027 (5th Cir. 1931).

<sup>15</sup> 115 F. 2d 859 (4th Cir. 1940), *cert. denied*, 312 U. S. 705, 85 L. Ed. 1138, 61 S. Ct. 828 (1941).

<sup>16</sup> 63 App. D. C. 30, 68 F. 2d 775 (1934).

as properly defined, since such lobbying may, unless controlled, impede the effectual exercise of the people's power. But Congress has no authority to impede the exercise of those functions of and by the people.

There is some justification for the argument that the House intended the words "lobbying activities" in its Resolution to encompass the full scope of the Regulation of Lobbying Act.<sup>17</sup> The terms of that Act apply to any person who receives money to be used for either of two purposes, the second purpose being "To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."<sup>18</sup> We do not have before us in this case either the meaning or the validity of the Lobbying Act and so are neither called upon nor empowered to decide those questions as such. A three-judge statutory court in this jurisdiction, composed of Circuit Judge Wilbur K. Miller and District Judges Schweinhaut and Holtzoff, has unanimously declared Sections 303 to 307 of the Lobbying Act to be unconstitutional.<sup>19</sup> We have already said enough to indicate that at least a serious constitutional question would arise if the House Resolution were to be interpreted to include the broad powers claimed for it by the Committee. The Resolution should be interpreted to avoid that doubt.

We are of opinion that the term "lobbying activities" in the House Resolution must be held to mean lobbying in its commonly accepted sense, and did not purport to convey power to investigate efforts to influence public opinion.

We are of opinion that the demand made upon appellant for the names of purchasers of books from his concern was outside the terms of the authority of the Buchanan Committee, since the public sale of books and documents is not "lobbying."

It may or may not be that, if members of the Congress were receiving gratuitously and anonymously copies of books or documents dealing with matters pending before them but also circulated generally in the public market, the Congress would be entitled to inquire as to the identity of the donors. The question presented by such a situation might be a difficult one, but the controversy before us is not drawn along those lines. Had Rumely been asked merely for the names of persons who anonymously financed the presentation of books or pamphlets to members of Congress a different problem would be here. But he was not asked that question;

<sup>17</sup> *Supra* note 3.

<sup>18</sup> Sec. 307(b) of the Act, 60 Stat. 841, 2 U.S.C.A. § 266(b).

<sup>19</sup> National Association of Manufacturers, et al. v. McGrath, Civil No. 381-48, March 17, 1952. ✓



he was asked and refused to give all the names of purchasers of books in amounts of \$500 or more.

In this connection we are inclined to observe further that anonymous donations of printed material to Congressmen appear to be a danger too insignificant to support abridgment of freedoms of speech, press and religion. Members of Congress need read only that which they want to read. The force behind the writing is the author, not the donor. And, moreover, the wastebasket is an invincible protector against harm by such means. "Lobbying" by personal contact is a different and more dangerous activity.

It is clear that authority over a subject matter does not import authority over all activities of persons concerned in that subject matter. Especially is it true that power over a subject matter involving speech, press, religion, assembly and petition does not go beyond the power to do that which is essential to be done in protection against a public danger. Many lawyers, businessmen, and others are required, and properly, to be in contact with legislators concerning legislation. And so they may be subject to regulation and open to inquiry concerning that activity. But the power of inquiry which arises from that reason does not strip from all other activities of those persons the rights which inhere in them and which are protected in terms by the First Amendment.

The scope of the power of legislatures to compel testimony in the course of investigation has been the subject more of comment by legal writers<sup>20</sup> than of interpretation by federal courts.<sup>21</sup> The Supreme Court had no occasion to consider the existence of such power until 1881, in *Kilbourn v. Thompson*,<sup>22</sup> and then the decision rested upon the view that the inquiry was not in aid of any

<sup>20</sup> See, e.g., Dimock, *Congressional Investigating Committees*, 47 JOHNS HOPKINS UNIV. STUDIES IN HIST. AND POLITICAL SCIENCE NO. 1 (1929); EBERLING, *CONGRESSIONAL INVESTIGATIONS* (1928); 1 WIGMORE, *EVIDENCE* § 4k (3d ed. 1940); 8 *id.* § 2195; Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Hamilton, *The Inquisitorial Power of Congress*, 23 A.B.A.J. 511 (1937); Cousens, *The Purposes and Scope of Investigations Under Legislative Authority*, 26 GEO. L.J. 905 (1938); Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 COL. L. REV. 1 (1933); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691, 780 (1926); 40 GEO. L. J. 137 (1951).

<sup>21</sup> Cases involving the question come before the courts in a variety of ways: in prosecutions under 2 U.S.C.A. § 192, as here; in *habeas corpus* proceedings; in tort actions for false imprisonment.

<sup>22</sup> 103 U. S. 168, 26 L. Ed. 377.



law-making function, the Court expressly reserving the question whether the power to inquire existed. Meanwhile, however, two well-considered state court opinions were rendered: one a Massachusetts case, *Burnham v. Morrissey*,<sup>23</sup> in which on the facts of the case, the assertion of the existence of the power may be said to be *dictum*; and the other a New York case, *Keeler v. McDonald*,<sup>24</sup> in which the decision rested squarely upon the existence of the power. Both of those cases and other state cases were considered by the Supreme Court when in 1927 it was faced with the question in *McGrain v. Daugherty*.<sup>25</sup> They were adopted as the rationale of that decision. The principles developed in the foregoing cases were matured in *Sinclair v. United States*.<sup>26</sup> Explicit in that decision is recognition of "the purpose of the courts well to uphold the right of privacy".<sup>27</sup> The Court, illustrating its concern in that respect, referred to cases<sup>28</sup> involving the power of Congress-created agencies to examine into private affairs, and quoted approvingly from a number of those opinions to show its care lest governmental inquiries abridge fundamental freedoms. The gist of the decision in the *Sinclair* case was that, since Congress had plenary power over federal property, it could ask questions about naval oil reserves.

Of course the publishers of books are not immune from law. This is the purport of the cases holding publishers and news agencies subject to laws of various sorts.<sup>29</sup> That is not the problem before us. Here the power claimed by the Committee is a power to inquire into the sale of books because those books attempt to

<sup>23</sup> 14 Gray 226 (1859).

<sup>24</sup> 99 N. Y. 463, 2 N. E. 615 (1885).

<sup>25</sup> 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319.

<sup>26</sup> 279 U. S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929).

<sup>27</sup> *Id.* at 292.

<sup>28</sup> *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125 (1894); *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115 (1908); *United States v. Louisville & N. R. R.*, 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363 (1915); *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336 (1924); *In re Pacific Ry. Comm'n* 32 Fed. 241 (C. C. N. D. Cal. (1887)).

<sup>29</sup> *Associated Press v. Labor Board*, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937); *Associated Press v. United States*, 326 U. S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946).

influence public opinion. In its opinions dealing with regulations imposed upon the press,<sup>30</sup> the Supreme Court has been most careful to point out that the regulations upheld did not bear upon the freedom of publication except to the extent that ordinary business burdens bear upon the publishing business.

Our attention is directed in alarm to the vast operations of Rumely's organization. We are referred to "indirect lobbying techniques" and to modern methods of lobbying. We are told that modern media for mass communication have made established concepts of lobbying archaic. We are told that there should be a reference source where full material concerning those who would influence public opinion could be had, and that organized groups who attempt to influence public opinion must be dealt with by Congress. None of these flourishes withstands scrutiny. Rumely's vast operations turn out to be the quantities of books and pamphlets which his organization distributes to the public. What is called a new lobbying technique turns out to be aroused public opinion. The new features are new mechanics of communication and new mass interest in the minutiae of congressional activities. But speech and press by these new means—on the radio, on television, and in the movies—are freedoms protected by the First Amendment. And the public policy which prohibits any current congressional membership from abridging the impact of public opinion upon the Congress is as sound today as it was when it was first formulated. If it be true that those who today would influence legislation turn from the buttonholes of the legislators to the forum of public opinion for support, a great good in the cause of representative government has been done. The evil to be dealt with is at the buttonhole, not in the arena of public discussion, whether that discussion be oral or written, over the air or on printed pages. These are basic principles of our concept of government. If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of those principles, we will have lost parts of the foundation of the Constitution.

The Government says that pertinency in this case was sufficiently shown by the fact that appellant had registered under the Federal Lobbying Act, even though under protest. The claim is startlingly broad. If valid, it would mean that all the affairs of any person who represented another in respect of legislation would be open to inquiry. But, as we have indicated, "pertinent", as used to describe a requisite for valid congressional inquiry, means pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation. Moreover, this appellant registered

<sup>30</sup> E.g., cases cited *ibid.*

under protest. Surely those cautious souls who register rather than risk the severe penalties of the Lobbying Act do not by that mechanical act waive all rights protected by the First and Fourth Amendments. We think this position of the Government not tenable.

The Government cites cases under the Federal Corrupt Practices Act. That subject must be considered in the light of the opinions in *United States v. C.I.O.*<sup>31</sup> We need not here repeat or attempt to summarize those opinions. They are pertinent in full text to this contention of the Government.

It is our view that the Resolution of the House which created the Buchanan Committee and gave it power to investigate "lobbying activities" did not confer the power which the Committee claimed in its demand upon appellant and which the Government upon this appeal claims for it, relating to the identity of the purchasers of books from his company. Appellant Rumely was within his rights when he refused to supply the information involved in the trial upon the indictment.

We think our dissenting judge discusses a case which is not before us—issues not presented in the trial court or here, and facts not in evidence in this record. The transcript of the hearings and the exhibits, including letters, etc., before the Buchanan Committee was neither offered nor admitted in evidence, except in so far as portions were reproduced in the Report to the House and in so far as a few excerpts were read to the jury. The agreement between counsel at the opening of the trial that the transcript was a correct transcript and that neither the reporter nor his shorthand notes need be resorted to, was no substitute for the presentation of evidence, and it did not purport to be. When the prosecutor wanted a portion of the hearings in evidence he said so. Thus he said, "... I should like to offer so much of it in evidence as is contained on pages 17, 18, 19, and a third of the way down on page 20, and read it to the jury at this time." And again he said, "At this time, Your Honor, I would like to offer in evidence almost a complete page of testimony of the hearings commencing on page 271 . . .". Certainly, in a criminal case we cannot take judicial notice of things the defendant is alleged to have said or done, not shown or offered to be shown in evidence; in fact, no request for such notice was made either in the trial court or before us. Nor can mere conclusions of the Committee serve in the place of such evidence. We repeat that the controversy before us is whether the sale of a book, such, for example, as "The Road Ahead", is "indirect lobbying" because it deals with national issues, and, if so, whether the

<sup>31</sup> 335 U. S. 106, 92 L. Ed. 1849, 68 S. Ct. 1349 (1948).

sale is within the scope of the investigative power of the Committee or of the Congress.

Appellant raises other questions respecting rulings of the trial judge during the course of the trial. We find it unnecessary to consider them.

The judgment of the District Court is reversed, and the case will be remanded with instructions to dismiss the indictment.

*Reversed and remanded.*

BAZELON, *Circuit Judge*, dissenting: Edward R. Rumely, the appellant, was ordered to appear before the House Select Committee on Lobbying Activities<sup>1</sup> to testify with regard to the Committee on Constitutional Government<sup>2</sup> of which he is Executive Secretary. The Buchanan Committee's mandate was:

"\* \* \* to conduct a study and investigation of \* \* \* all lobbying activities intended to influence, encourage, promote, or retard legislation \* \* \*"<sup>3</sup>

It was interested in learning how the CCG and Rumely—both registered under the Federal Regulation of Lobbying Act<sup>4</sup>—operated, where the organization's funds came from, etc., in order to determine whether there was anything in its activities and those of other organizations which might require revision of existing lobbying laws.

As a part of this investigation, the Buchanan Committee sought to ascertain whether so-called purchases of books and pamphlets from the CCG for amounts of \$500 or more were really disguised contributions—a device to evade those sections of the Lobbying Act which require "any person \* \* \* who \* \* \* receives money \* \* \* to be used principally to aid \* \* \* [t]he passage or defeat of any

<sup>1</sup> Hereafter referred to as the Buchanan Committee.

<sup>2</sup> Hereafter referred to as CCG.

<sup>3</sup> H. Res. 298, 81st Cong., 1st Sess. (Aug. 12, 1949), printed in *Hearings before House Select Committee on Lobbying Activities*, 81st Cong., 2d Sess., pt. 1, p. 1 (1950) (hereafter cited as *Hearings*), and also J. A., p. 188.

<sup>4</sup> 60 STAT. 839, 2 U.S.C. § 261 (1946). Registration was under protest, J.A., p. 182, apparently on the theory that the CCG was a "publisher," rather than a lobbying organization, Brief for Appellant, pp. 14-16, and did not have as its principal purpose "[t]o influence, directly or indirectly, the passage or defeat of any legislation." 60 STAT. 839, 841, 2 U.S.C. § 266 (1946).



legislation by the Congress of the United States [or] [t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States".<sup>5</sup> to report to the Clerk of the House of Representatives "the name and address of each person who has made a contribution of \$500 or more."<sup>6</sup> This phase of the inquiry revealed that shortly after the statute was enacted and the appellant and the CCG had registered thereunder, the CCG had changed its pattern of financial support. Its new policy was to reject and return "contributions" in excess of \$490<sup>7</sup> unless the remitter designated "the material purchased and the direction of its distribution."<sup>8</sup> Rumely admitted that this policy was adopted "[t]he moment the [lobbying] law went into effect,"<sup>9</sup> and because "[w]e didn't want to get into the position of reporting our contributors."<sup>10</sup>

<sup>5</sup> *Ibid.*

<sup>6</sup> 60 STAT. 839, 840, 2 U.S.C. § 264(a)(1) (1946). Emphasis supplied. See H. R. REP. No. 3024, 81st Cong., 2d Sess. 1-3 (1950), (hereafter cited as H. R. REP. No. 3024) which is a part of the record in this case as Government Exhibit No. 4.

<sup>7</sup> *Id.* at 1-3, 9.

<sup>8</sup> Letter of Jan. 17, 1950, from Sumner Gerard, Treasurer, Committee for Constitutional Government, to Mr. E. L. Noyes, Eli-Lilly & Co., printed in *Hearings* pt. 5, p. 32; reproduced in note 31; *infra*.

<sup>9</sup> *Hearings* pt. 5, p. 37.

<sup>10</sup> *Id.*, at 29. See also *id.* at 37, 42. H. R. REP. No. 3024 states, at page 2:

"Of particular significance is the fact that Edward A. Rumely and the Committee for Constitutional Government, Inc., in recent years have devised a scheme for raising enormous funds without filing true reports pursuant to the provisions of the Federal Regulation of Lobbying Act. This scheme has the color of legality but in fact is a method of circumventing the law. It utilizes the system \* \* \* whereby contributions to the Committee for Constitutional Government are designated as payments for the purchase of books, which are transmitted to others at the direction of the purchaser, with both the contributor of the money and the recipients of the books totally unaware of the subterfuge in most cases."

The theory behind this arrangement was, of course, that the names of "purchasers of books" for amounts of \$500 or more need not be reported under the Lobbying Act whereas "contributors" giving \$500 or more would have to be disclosed.



It was in the light of these admissions and the Buchanan Committee's desire to learn the financial sources which were making possible the vast operations of CCG<sup>11</sup> that it asked Rumely for the names of "purchasers" of \$500 or more of CCG's books and pamphlets. Apparently the Buchanan Committee wanted to question these people in the process of further establishing that some were not bona fide purchasers but merely heavy contributors to the lobbying activities of which CCG was the focal point. It was at this juncture that Rumely and the Buchanan Committee came to loggerheads. Because Rumely refused to disclose the names requested, he was afterwards cited for contempt of Congress.<sup>12</sup>

<sup>11</sup> The nature of the CCG operation was one that required large amounts of money. H. R. REP. NO. 3024 points out, at page 1, that Rumely and the CCG "have registered and reported as lobbyists under the Federal Regulation of Lobbying Act since October 7, 1946. Since that date the Committee for Constitutional Government, Inc., has reported spending approximately \$2,000,000. One of the chief functions of the Committee for Constitutional Government, Inc., is the distribution of books and pamphlets presenting one side of national legislative issues. In the period 1937 to 1944, prior to the enactment of the Federal Regulation of Lobbying Act of 1946, the Committee for Constitutional Government, Inc., distributed some 82,000,000 booklets, pamphlets, and other pieces of literature, or at the rate of about 12,000,000 pieces a year." This material was sent to "every type of [mailing] list," *Hearings* pt. 5, p. 93, of "opinion molders" including clergymen, labor and farm leaders, educators, governors and legislators, doctors, journalists, business executives and millionaires. *Id.* at 95. Much of this material, Rumely admitted, was sent out under congressional frank. Letters written by Rumely indicated that one CCG technique was to have some Member interested in a particular subject and statement introduce it into the Congressional Record. *Id.* at 98-102, 106-7. The Congressman then ordered a number of copies designated by the CCG to be printed by the Government Printing Office. And since the CCG could not draw a check to the Government Printing Office, payment was made to the Congressman who in turn remitted to the Government Printing Office. *Id.* at 97-107. Rumely admitted sending 2,800,000 pieces out under frank in 1949, *id.* at 101, and eight to ten million between the passage of the Lobbying Act and the Buchanan Committee investigation. *Id.* at 97-8. In addition to the flood of pamphlets, the CCG published millions of books, as indicated in the majority opinion of the court.

<sup>12</sup> Rumely was also indicted for refusing to disclose the identity of a woman from Toledo who gave CCG \$2,000 for the distribution of "The Road Ahead." J. A., pp. 4, 32.

The scope of a congressional committee's investigation is limited by statute to matters pertinent to the inquiry authorized by Congress. And "[t]he question of pertinency \* \* \* [is] one of law."<sup>13</sup> The trial court instructed the jury as a matter of law that the Buchanan Committee

- was a validly constituted committee of Congress; that said committee had jurisdiction over the matters under consideration; that the records and information requested, as alleged in Counts 1 and 6, and the question asked, as alleged in Count 7, were pertinent thereto \* \* \*"<sup>14</sup>

The jury then found Rumely guilty of contempt of Congress.

Before discussing the broader issues presented by this appeal, I turn for a moment to consider a narrower aspect of the case. It has to do with the Government's reliance upon the fact that both Rumely and the CCG had registered under the Lobbying Act to establish the pertinency to the inquiry of the information sought by the Buchanan Committee.<sup>15</sup> In rebuttal, Rumely showed that he and the CCG had registered under protest. He did not claim that registration was induced or coerced by any governmental source. I agree with the trial judge's ruling that proof of registration was a sufficient basis for establishing the pertinency of the information sought. I think it reasonable to conclude that by registering Rumely and the CCG recognized the possibility, at least, that their activities might be found to constitute attempts "[t]o influence, directly or indirectly, the passage or defeat of any legislation." It can hardly be ~~that~~ that the Buchanan Committee was without power to inquire into the operation of the Lobbying Act and to determine whether the Act does or should reach the activities of a registrant. Clearly pertinent—in fact, vital—to such an inquiry was the information concerning the source and pattern of CCG's financial support.<sup>16</sup>

<sup>13</sup> *Sinclair v. United States*, 279 U. S. 263, 298 (1929).

<sup>14</sup> J. A., p. 175.

<sup>15</sup> J. A., pp. 40-2.

<sup>16</sup> "Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Committee for Constitutional Government, Inc., is evading or violating the letter or the spirit of the Federal Regulation of Lobbying Act by the establishment of class or contributions called 'Receipts from the sale of books and literature,' or whether they are complying with a law which requires amendments to strengthen it.

"The policy of the Committee for Constitutional Government,

Although the fact of registration alone was sufficient to establish pertinency, the BUCHANAN COMMITTEE REPORT CITING EDWARD A. RUMELY which was made a part of the record in this case, makes it clear that the questions which Rumely refused to answer were pertinent to the legislative inquiry. In addition, the Buchanan Committee hearings, which were only partially introduced in the trial record, support this conclusion.<sup>17</sup> Since judicial notice can be taken of congressional hearings, there is no reason why an appellate court "should not advise itself from outside the record of such facts as appear to admit of no genuine dispute."<sup>18</sup> As will

Inc., of refusing to accept contributions of more than \$490 unless earmarked for books, etc., may also involve: (1) Dividing large contributions into installments of \$490 or less, and causing the records of the Committee for Constitutional Government to reflect receipts of each installment on a different date, and/or causing the records of the Committee for Constitutional Government to give credit, for the several installments, to various relatives and associates of the actual contributor. (2) Causing the Committee for Constitutional Government's records as to 'Contributions' to reflect less than the total amount of contributions actually received, by labeling some part of such funds as payments made for printed matter.

"Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Federal Regulation of Lobbying Act requires amendment to prevent division of large contributions into installments, or to prevent the crediting of contributions to others than the real contributor, or to prevent the use of other subterfuges." H. R. REP. No. 3024, pp. 2-3.

While the hearings insofar as they pertain to Rumely and the CCG, were not made a part of the record in their entirety, they were filed with the trial court, under the conditions agreed to in the following colloquy:

"MR. HITZ [Government Counsel]: I may say, Your Honor, that for the purposes of this trial it has been agreed between Mr. Burkinshaw and myself that the two volumes, Part 4 and Part 5 of the hearings, insofar as they relate to Mr. Rumely, are correct and we will not go to the reporter or to any shorthand notes for that purpose. Is that right?"

"MR. BURKINSHAW [Counsel for Rumely]: That is right, absolutely."

<sup>18</sup> United States v. Aluminum Company of America, 148 F. 2d 416, 445 (2d Cir., 1945); see also United States v. Darby, 312 U. S. 100, 109 (1941); Overfield v. Pennroad Corporation, 146 F. 2d 889, 898 (3d Cir. 1944).

appear, the evidence adduced before the Buchanan Committee furnishes both supplementary and independent grounds supporting the trial court's ruling that the information sought was pertinent to the inquiry.<sup>19</sup>

Turning now to the broader issues of the case, appellant says, in substance, that (1) the House Resolution<sup>20</sup> did not undertake to authorize any inquiry to which the requested information would be pertinent; (2) the requested information was beyond the constitutional limits of legislative inquiry; and (3) compulsory disclosure of this information would violate First Amendment rights.

(1) This court says that, by definition or common understanding, the words "all lobbying activities," which House Resolution 298 authorized the Buchanan Committee to investigate, refer only to "representations made *directly* to the Congress, its members, or its committees."<sup>21</sup> I think this definition unduly narrow. Lobbying has had a broader sense for at least forty years. The court's constricted concept of lobbying provides the premise for its conclusion that questions with regard to *indirect* lobbying techniques are not pertinent to an inquiry said by the court—but not by Congress—to be limited to *direct* representations to Congress. Since I think the court's basic premise incorrect, I must reject the conclusion built upon it.

As early as 1913,

" \* \* \* House and Senate investigations \* \* \* gave the first thorough airing to what might be properly called modern lobbying as we know it today. The Senate investigation was prompted by President Wilson's charge that an industrious and, as he called them, 'insidious body of tariff lobbyists,' was spending money without limit in an effort to create an

<sup>19</sup> "This court has repeatedly held—and it is not alone in so holding—that a judgment need not be affirmed solely upon the ground that seemed controlling to the lower court. A fortiori, this court is not bound by the theory urged by the successful litigant below. The rule might be otherwise, though we are not here so holding, if the appellant urged one ground in the court below, assigned error, and then changed his position on appeal. It might then be urged, perhaps, that the lower court should have been given the benefit of the appellant's theory, and thus possibly have avoided the alleged error." *Wagner v. United States*, 67 F. 2d 656, 657 (9th Cir. 1933); cf., *Smith v. United States*, 173 F. 2d 181, 185 (9th Cir. 1949).

<sup>20</sup> H. Res. 298, 81st Cong., 1st Sess. (Aug. 12, 1949), printed in *Hearings* pt. 1, p. 1, and also J. A., p. 188.

<sup>21</sup> Page 15, *supra*. Emphasis supplied.



impression of public opinion contrary to some of the chief items of the administration's sponsored Underwood tariff bill.

"Each committee in its own way also concluded that even in 1913 lobbying consisted less of personal appeals to Congressmen than it did of organized efforts to mold public opinion and influence Congress by means of the artificially created public pressure."<sup>22</sup>

This trend, already apparent in the early part of the century, has since become accelerated. Present-day means of communication, which have changed modes of living and the course of history, have also relegated the restrictive concept of direct "contacts with legislators" as a means of influencing legislation to the horse and buggy era. The appellant himself, in a pamphlet entitled "Needed Now—Capacity for Leadership, Courage to Lead," deprecated the value "of such old lobbying techniques as 'noisy delegations' \* \* \* which buttonholed legislators' and 'stunts which attract some popular attention but persuade no Congressmen.'"<sup>23</sup> Congress has long recognized that modern media for mass communication have brought with them the need for vigilant inquiry.<sup>24</sup> And in House debate on the very resolution under which the Buchanan Committee

<sup>22</sup> *Hearings* pt. 1, pp. 54, 55.

<sup>23</sup> This pamphlet is quoted in *Hearings* pt. 5, p. 6.

<sup>24</sup> To that end it has adopted "the principle of disclosure in both the economic and political spheres. The Securities and Exchange Commission, the Federal Trade Commission and the Pure Food and Drug Administration make available to the public information about sponsors of economic wares. In the political realm, the Federal Communications Commission, the Post Office Department, the Clerk of the House of Representatives, and the Secretary of the Senate—all of these under various statutes—are required to collect information about those who attempt to influence public opinion. Thousands of statements disclosing the ownership and control of newspapers using the second-class mailing privilege are filed annually with the Post Office Department. Hundreds of statements disclosing the ownership and control of radio stations are filed with the Federal Communications Commission. \* \* \* In 1938, Congress found it necessary to pass the Foreign Agents Registration Act which forced certain citizens and aliens alike to register with the Department of Justice the facts about their sponsorship and activities. \* \* \*

\* \* \* [The Government] ought to provide a source of refer-



acted, Members of the House (1) specifically mentioned the CCG as being a large lobbying organization and (2) indicated that one aim of the investigation would be to determine how organizations, in reporting under the Lobbying Act, were allocating their expenses between legislative lobbying and "nonlegislative" or "noncongressional lobbying."<sup>25</sup> Any concept of "lobbying activities" which ignores the realism of the day is an archaic one, bottomed either on outmoded dictionary definitions or on judicial constructions drawn from unrelated contexts.<sup>26</sup> I think Congress directed the Buchanan Committee to investigate indirect as well as direct lobbying techniques and that the information requested from Rumely was pertinent to such investigation.

(2) To say that modern methods of lobbying cannot be inquired into by virtue of the same power which permits legislative inquiry into the older, and less effective methods would be to stifle the legislative process. Yet I understand appellant's contention to be that the information demanded by the Buchanan Committee was beyond the constitutional limits of legislative inquiry because no valid legislation could deal with indirect lobbying.

It is of course true that the area for legislating with respect to the whole lobbying problem is subject to constitutional limitations. This is merely another instance of the price we pay for the protection of things we deem far more valuable. But constitutional boundaries cannot be marked by the shotgun argument that no valid legislation could possibly emanate from a legislative inquiry to which the information sought here would be pertinent. As the Second Circuit said in *United States v. Josephson*:<sup>27</sup>

" \* \* \* in substance [the contention] is that the Committee's power to investigate is limited by Congress' power to

---

ence where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion." *To Secure These Rights: The Report of the President's Committee on Civil Rights* 52-3 (1947).

<sup>25</sup> 95 Cong. Rec. 11386, 11389 (1949). See also the remarks of Congressman Buchanan at the opening of the inquiry. *Hearings* pt. 1, pp. 7-8.

<sup>26</sup> For a discussion of modern lobbying techniques, see, e.g., Comment, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L. J. 304 (1947).

<sup>27</sup> 165 F. 2d 82, 90-1 (1947), cert. denied 333 U. S. 838, rehearing denied, 333 U. S. 858, motion for leave to file a second petition for rehearing denied 335 U. S. 899 (1948).

legislate; Congress is prohibited from legislating upon matters of thought, speech, or opinion; ergo, a statute empowering a Congressional committee to investigate such matters is unconstitutional. The mere statement of this syllogism is sufficient to refute it. Congress obviously can use information gathered by this Committee to pass legislation not encroaching upon civil liberties, as above noted. The appellant's argument necessarily, therefore, is reduced to the absurd proposition that because the facts resulting from the Committee's investigations conceivably may also be utilized as the basis for legislation impairing freedom of expression, the statute authorizing such investigations must be held void."

We are not dealing here with the constitutionality of an act of Congress. Nor are we being asked to render an advisory opinion on the constitutionality of legislation which might conceivably be drafted at some time in the future. As this court said a few years ago in the *Barsky* case,<sup>28</sup> Congress was engaged here in a "preliminary inquiry [which] has from the earliest times been considered an essential of the legislative process. \* \* \* Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry."

Congress, through the Buchanan Committee, was concerned with a perennial problem in our democracy—how to deal with highly organized pressure groups, and the distortions and evils they sometimes bring in their wake, and how to distinguish such groups from individual citizens petitioning their representatives. Neither direct nor indirect lobbying is an evil and a danger, but either can become so, if plainly or subtly dishonest methods are used to distort the legislative function. The court recognizes that this is true with respect to indirect lobbying when it says that "an evil might arise" "if influences upon public opinion were being bought and prostituted."<sup>29</sup> I reject the notion that because Congress may not constitutionally prohibit indirect lobbying activities, it is without power to provide any measure of protection for itself and the public from its abuse. And here, since the Buchanan Committee had strong reason to believe that the abuse had already arisen, the attending circumstances were clearly pertinent to its inquiry. A convincing example to support that belief is found in the letter under date of January 10, 1950, from Eli Lilly & Co., a corporation

<sup>28</sup> *Barsky v. United States*, 83 U. S. App. D. C. 127, 131, 167 F. 2d 241, 245 (1948), cert. denied 334 U. S. 843.

<sup>29</sup> Majority opinion, p. 14.

manufacturing medicinal products, advising that their "budget committee had approved a contribution <sup>30</sup> of \$25,000 to the CCG for the calendar year 1950"; and the CCG's reply thereto under date of January 17, 1950. These letters are reproduced in this margin.<sup>31</sup>

To determine, *inter alia*, "if influences upon public opinion were being bought and prostituted," <sup>32</sup> the Constitution permitted and

<sup>30</sup> Emphasis supplied.

<sup>31</sup> Letter from E. L. Noyes, Eli Lilly & Co., Indianapolis, Indiana:

"January 10, 1950.

"COMMITTEE FOR CONSTITUTIONAL GOVERNMENT,

205 East Forty-Second Street, New York 17, N. Y.

"GENTLEMEN: This is to advise you that our budget committee has approved a contribution of \$25,000 to the Committee for Constitutional Government for the calendar year 1950.

"In approving this contribution, it was the consensus of opinion of our budget committee that we should like to have you use some of these funds in distributing books, pamphlets, Paul Revere messages, etc., to a mailing list which we will supply you with. Such a mailing list would include school teachers, members of the clergy, and other influential groups of our local community. Can you advise me as to how large a mailing list this contribution will supply with the educational material which your committee publishes?

"It is also our opinion that perhaps distribution of every publication to these individuals might be so excessive as to do more harm than good. The tendency might arise for these people to throw everything that comes in the mail into the nearest wastebasket. Therefore, would it be possible, in case we so desire, to supply you with a mailing list and to have you mail to them only those publications which we designate.

"With all good wishes for a very successful year, I am

Sincerely yours,

E. L. NOYES."

Reply of Sumner Gerard, Treasurer, CCG:

"COMMITTEE FOR CONSTITUTIONAL GOVERNMENT

January 17, 1950.

"MR. E. L. NOYES,

Eli Lilly & Co., Indianapolis 6, Ind.

"MY DEAR MR. NOYES: Your letter of January 10 announcing a \$25,000 purchase of our educational material was a source of great

Congress authorized a broad inquiry. The purpose of that inquiry was to find the problems, from hypotheses for coping with them, and then, in the light of the facts brought out by the investigation,

encouragement to Dr. King and myself. Because of Mr. Gannett's frequently expressed admiration and friendship for you, we sent him a copy of your letter. On Monday morning, he telephoned from Miami Beach greatly pleased over this news.

"Your substantial purchase so early in the year will enable us to lift our committee's activities to higher levels of effectiveness. We have found that money put to work in January multiplies itself several fold during the year by bringing in additional support. This purchase of material should be charged on your books as an outright purchase and not as a contribution.

"The firm of Farabaugh, Pettengill, Chapleau & Roper have given us an opinion that such purchases of material to uphold our free-enterprise system are legitimate corporate expense, like other advertising, and the Treasury Department has accepted in hundreds of cases such expenditures as legitimate corporate purchases. When purchasing, it is necessary for the purchaser to do exactly what you suggest, namely to designate the material purchased and the direction of its distribution.

"We will service a list of 5,000 names at \$4 per individual name 22 times between February and December 1950; or a list of 10,000 eleven times; or of 25,000 four times. In connection with this we will include the distribution of 5,000 copies of Norton's great book *The Constitution of the United States: Its Sources and Its Application*, and 3,000 copies of Pettengill's *For Americans Only*. We stand ready to cooperate with you in working out in detail, as may best suit your wishes, the servicing of such lists as you designate.

"We suggest that you set aside \$8 per name for the full Paul Revere messages service to 300 including all State legislators in Indiana (150), the balance of 150 to go to names that you particularly designate in your own organization or in the city of Indianapolis. We will include in this service a copy of the Norton book and a copy of Dr. King's *The Keys To Prosperity* which should have a special value to State legislators.

"With \$20,000 for the mailings, \$2,400 for this Paul Revere service to 300 names, there would be left \$2,600. We would suggest that you set aside this amount, at \$1 per copy, for 2,600 copies of *Compulsory Medical Care and the Welfare State* by Melchior Palyi. The report upon which this book is based was worked up at a substantial expenditure by the National Physicians Committee before it disbanded. We expect to have shortly 20,000 copies in



determine which hypotheses could best stand the test of experience, the Constitution and a vote in Congress. It cannot be seriously urged that every problem and every hypothesis must meet the test of constitutionality.

book form, publication price \$2. Our price to you will be \$1 per copy.

"The contents of the book are of such great importance that distribution to key leaders in national thinking and in positions of public influence should be made soon. If you agreed to allot \$2,600 to this distribution we will bear distribution cost and send to all Members of Congress, all Governors, to selected editors, newspaper columnists, and radio commentators, and to 600 of the top-level leaders in the medical profession, including all officers of State medical associations.

"Any portion of this distribution where you desired it we would be glad to include your courtesy card as donor. Otherwise we shall distribute over the name of the committee itself. In the case of Palyi's book we shall seek some individual of public influence to write an accompanying letter calling attention to the book and its great importance. In the distribution to Congress we might have Congressman Smith himself—the head of a medical clinic and highly respected in both Houses of Congress—write the accompanying letter asking that every Member read the content. Please note copy of the telegram to members of the Rules Committee enclosed herewith.

"Our trustees will meet on January 25 and it would be a matter of great encouragement if we could have this transaction closed by that date.

"In the meantime, if you or any other member of your organization come to New York City, do give Dr. King and the other members a chance to exchange thought with you.

Sincerely yours,

SUMNER GERARD, *Treasurer.*"

These letters are reproduced in H. R. REP. No. 3239, 81st Cong., 2d Sess. 8-13 (1951), and are printed in *Hearings* pt. 5, pp. 32-3.

Congressman Buchanan also remarked: "I might say that the total amount of loans and contributions that you [Rumely] did furnish to the Committee aggregate a very small amount; a fact, I think it is about \$25,000, in contrast to the very wide ramifications of conduct of your Committee for Constitutional Government, which, running as of the current quarter, will exceed \$1,100,000 this year. I think that we have a right to know and have a right to seek that information." H. R. REP. No. 3024, p. 16.

<sup>32</sup> Majority opinion, p. 14.



(3) If, as I believe, Congress had the power to and did authorize the Buchanan Committee's inquiry into indirect as well as direct lobbying activities, and that the particular questions in controversy here were pertinent to that inquiry, then in the absence of some constitutional privilege, appellant's refusal to answer was a contempt of Congress. Appellant claims such a privilege, resting his refusal of the requested information upon the lofty heights of the freedom of speech, press and petition guaranteed by the First Amendment. As I understand it, this claim is laid upon the factual premise that all amounts of \$500 or more were received from persons who purchased the CCG's literature, rather than persons who used ostensible purchases to cloak what were actually contributions for which disclosure was required by the Lobbying Act. I think the BUCHANAN COMMITTEE REPORT CITING EDWARD R. RUMELY and hearings made abundantly clear that this premise is untenable. I would therefore reject the claim of privilege of non-disclosure that rests upon it.

The BUCHANAN COMMITTEE REPORT CITING EDWARD A. RUMELY and the hearings on House Resolution 298 disclosed, as summarized above,<sup>33</sup> that the CCG is a registered and well-financed Lobbying organization engaged in distributing propaganda material on a large scale. In addition to the activities which the court regards as indirect, CCG also engaged in direct lobbying.<sup>34</sup> Finally, the Report

<sup>33</sup> See text and note 11, *supra*.

<sup>34</sup> Rumely stated at the hearings that he had registered as a lobbyist "because I send to Congress releases and other material," J. A., p. 32. Rumely admitted that CCG had attempted to influence legislation by circulating letters and telegrams to Members of Congress and private citizens urging defeat of a presidential plan for reorganizing the National Labor Relations Board, *Hearings* pt. 5, pp. 66-8, H. R. REP. No. 3024, p. 11, protesting executive action under the Walsh-Healey Act, *Hearings* pt. 5, pp. 78-9, opposing pending public housing legislation, *id.* at 79-80, and medical care legislation, *id.* at 77-8, and supporting tax reforms, *id.* at 79, including a program for a constitutional limitation on individual income taxes, H. R. REP. No. 3024, pp. 13-14. In addition, the CCG occasionally arranged dinners for congressmen through its Washington representative, including an abortive effort to bring together a group of congressmen at a crucial time in the legislative voting on the Taft-Hartley Act, *Hearings* pt. 5, pp. 80-92. Plans for this dinner were made by Homer Dodge, Washington representative of the CCG. *Ibid.* Mr. Dodge's other duties apparently included keeping in touch with congressmen on matters of interest to CCG, especially the mailing of CCG propaganda under congressional frank. See various letters by Dodge reproduced at *id.* pt. 5, pp. 68, 106-7, 151. See also notes 11 and 16, *supra*.

and hearings disclose that the CCG changed its pattern of financial support upon passage of the Lobbying Act because "[w]e didn't want to get into the position of reporting our contributors." It seems to me immaterial that among those from whom the CCG received \$500 or more, there may have been some who had other motives than the influencing of opinion and legislation. In any reasonable view of the facts, it is clear that appellant and the CCG engaged in a course of conduct calculated to disguise lobbying contributions as purchases.

Congress has adopted the principle of disclosure as a means of preserving the integrity of the election process as well as the legislative process. Thus, for example, a recent enactment makes it unlawful to publish any pamphlet, advertisement, etc., relating to any person who has declared his intention to seek federal office unless the publication bears the name of the person responsible for its publication.<sup>35</sup> The Corrupt Practices Act requires the treasurer of a political committee to file with the Clerk of the House of Representatives "[t]he name and address of each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of \$100 or more, together with the amount and date of such contribution."<sup>36</sup> In the only attack on the latter provision to reach the Supreme Court, First Amendment rights were not even discussed. Instead, the Court said,

"To say that Congress is without power to pass appropriate legislation to safeguard [the] election [of the President and Vice President] from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection."<sup>37</sup>

<sup>35</sup> 62 STAT. 719, 724 (1948), as amended, 18 U. S. C. § 612 (1951). 62 STAT. 718, 723 (1948) 18 U. S. C. § 608(b) (1951) reads: "Whoever purchases or buys any goods, commodities, advertising, or articles of any kind or description, the proceeds of which, or any portion thereof, directly or indirectly inures to the benefit of or for any candidate for an elective Federal office including the offices of President of the United States, and Presidential and Vice Presidential electors or any political committee or other political organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

<sup>36</sup> 43 STAT. 1070, 1071 (1925), 2 U.S.C. § 244 (1946).

<sup>37</sup> *Burroughs and Cannon v. United States*, 290 U. S. 534, 545 (1934). See also *United States v. United States Brewers' Ass'n*, 239 Fed. 163, 169 (W.D. Pa. 1916).

No one would seriously contend that the requirements for disclosure under the Corrupt Practices Act are offensive to the Constitution. The First Amendment is not violated merely because disclosure might conceivably deter some from implementing their political views with financial support. And although the question before us does not depend upon the constitutionality of the analogous provisions in the Lobbying Act,"<sup>38</sup> the same principles are applicable to them." If legislation requiring financial disclosure is free from objection on First Amendment grounds, compulsion of these disclosures by legislative inquiry is likewise free from the same objection. The Buchanan Committee has restricted no one in the free exercise of his rights to say what he pleases, or to assemble and to petition for any purpose.

I do not think that the constitutional rights of free speech, press and petition afford a greater degree of protection to contributions in the disguised form of purchases than to contributions in pristine form. And since I believe that the latter are not protected from disclosure by First Amendment rights, I do not see how such protection can be accorded to the former. To hold otherwise would only reward artifice and subterfuge. The CCG's right to promote, retard and otherwise influence legislation is inviolate. But that right does not extend to protection from disclosure of its financial support. I would affirm the conviction.

United States Court of Appeals for the District of Columbia Circuit. Filed Apr 29, 1952. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit  
April Term, 1952

No. 11,066

EDWARD A. RUMELY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, PROCTOR and BAZELON, *Circuit Judges*

#### JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

<sup>38</sup> 60 STAT. 839, 840, 841-2, 2 U.S.C. §§ 264, 267 (1946).

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with instructions to dismiss the indictment.

Per Circuit Judge PRETTYMAN.

Dated: April 29, 1952.

Separate dissenting opinion by Circuit Judge Bazelon.

United States Court of Appeals for the District of Columbia Circuit. Filed May 19, 1952. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 11,066

EDWARD A. RUMELY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

#### DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

PHILIP B. PERLMAN,  
*Solicitor General,*  
*Counsel for Appellee.*

#### CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing designation of record have been mailed to the following counsel for Appellant:

Donald R. Richberg, Esq., Alfons Landa, Esq., Delmar W. Holloman, Esq., c/o Davies, Richberg, Tydings, Beebe & Landa, 1000 Vermont Avenue, N. W., Washington, D. C.

PHILIP B. PERLMAN,  
*Solicitor General,*  
*Counsel for Appellee,*

Dated: May 19, 1952.

## United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered 1 to 235, both inclusive, constitute a true copy of the joint appendix to the briefs and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellee, in the case of: Edward A. Rumely, Appellant, v. United States of America, Appellee, No. 11,066, April Term, 1952, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-seventh day of May, A. D. 1952.

JOSEPH W. STEWART,

[SEAL.]

*Clerk of the United States Court of Appeals  
for the District of Columbia Circuit.*







Supreme Court of the United States

No. 87, October Term, 1952

THE UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD A. RUMELY

*Order allowing certiorari*

Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton and Mr. Justice Minton took no part in the consideration or decision of this application.

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87  
No. 233

# In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD A. RUMELY

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DIS-  
TRICT OF COLUMBIA CIRCUIT

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*cannot be conducive to well considered legislation.* [Emphasis supplied.]

Under these circumstances, we submit, there can be no question that when Section 307(b) of the Lobbying Act (2 U.S.C. 266(b)) provided that the report requirements were applicable to any person receiving money "to influence, directly or indirectly," federal legislation, Congress intended the Act to apply to pressure organizations, and that when, four years after the enactment of the Lobbying Act, the House of Representatives authorized the Select Committee to investigate lobbying, it intended to have that committee study the methods of, and the effects of the lobbying act upon, "professionally inspired efforts to put pressure upon Congress," directly or indirectly. To hold that Congress is without power to conduct such an inquiry is to hold that Congress cannot inquire into the fundamental working of the democratic process.

It is unnecessary in this case to consider to what extent Congress may validly legislate in relation to organized efforts to influence public opinion on federal matters. It is sufficient to point out that the majority opinion below is clearly erroneous in assuming that there cannot possibly be any valid legislation in this field.<sup>4</sup> As the dissenting opinion

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<sup>4</sup> The United States District Court for the District of Columbia recently held certain sections of the Lobbying Act unconstitutional for indefiniteness (*National Association of Manufacturers v. McGrath*, 103 F. Supp. 510). This holding,

points out (R. 216, n. 24), the principle of disclosure is one embodied in our law in many forms, and one which has been consistently upheld. E.g., the disclosure provisions of the Federal Corrupt Practices Act (now 2 U.S.C. 241-256) were upheld in *Burroughs and Cannon v. United States*, 290 U.S. 534; the conditioning of second class mailing privileges on disclosure of ownership and the marking of advertisements as such was upheld in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288. While this Court found it unnecessary to pass upon the constitutionality of the Foreign Agents Registration Act (22 U.S.C. 611, *et seq.*) in the case of *Viereck v. United States*, 318 U.S. 236, because it held the activities there involved not within the purview of the statute, the constitutional basis of the statute's disclosure requirements were expressed in the dissenting opinion of Mr. Justice Black, at p. 251, as follows:

\* \* \* Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes

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even if sustained on appeal, obviously does not negate Congressional power to legislate with respect to lobbying. The fact that the particular act was held deficient does not mean that Congress cannot enact a constitutional statute on the same subject. Indeed, the case might be cited to illustrate the need of continued Congressional inquiry as a basis for drafting a more definite law.

# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 801

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD A. RUMELY

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DIS-  
TRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia reversing respondent's conviction for wilful refusal to supply records and give testimony to a duly authorized committee of Congress.

## OPINIONS BELOW

The opinions in the Court of Appeals (R. 93-224) are not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered April 29, 1952 (R. 224-225). The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

#### QUESTIONS PRESENTED

1. Whether Congress had power to authorize inquiry into organized efforts to influence public opinion in regard to federal legislation and whether the Select Committee on Lobbying Activities was authorized to do so.

2. Whether information sought by the Select Committee, as to names of those who gave sums of over \$500 to the Committee for Constitutional Government, Inc., an organization registered under the Lobbying Act, for the purchase or distribution of books of that organization, was pertinent to the inquiry.

#### STATUTES INVOLVED

R. S. 102, as amended, 52 Stat. 942, 2 U.S.C. 192, provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, \* \* \* or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.



## STATEMENT

Respondent was convicted on counts one, six, and seven of an indictment charging wilful refusal to produce records and give testimony before the Select Committee on Lobbying Activities of the House of Representatives, in violation of 2 U.S.C. 192 (R. 2-4, 181). The Committee had been created by resolution (H. Res. 298, 81st Cong., 1st sess., Gov. Ex. 2, R. 18), authorizing it to conduct a study and investigation, *inter alia*, of "all lobbying activities intended to influence, encourage, promote or retard legislation." Count one charged that respondent wilfully refused to produce records, duly subpoenaed, of the Committee for Constitutional Government, Inc., showing the name and address of each person from whom a total of \$1,000 or more had been received by the Committee from January 1, 1947, to May 1, 1950, for any purpose, including receipts from the sale of books and pamphlets. Count six charged a similar offense as to a subpoena calling for the names and addresses of those from whom the Committee on Constitutional Government had received \$500 or more, and count seven charged wilful refusal to give the name of a woman from Toledo who gave \$2,000 for distribution of a book called *The Road Ahead*. (R. 2-4.)

The background of the subpoenas and of the question asked respondent is set forth in full in a report of the Select Committee (H. Rep. 3024,



81st Cong., 2d sess.). This report was certified to the United States Attorney for the District of Columbia pursuant to a resolution of the House of Representatives in accordance with the provisions of Section 104 of the Revised Statutes as amended, 2 U. S. C. 194; Govt. Ex. 4, R. 19.

According to that report, the Committee for Constitutional Government, Inc., and respondent, its executive secretary, have been registered as lobbyists since October 7, 1946,<sup>1</sup> and the Committee reported spending approximately \$2,000,000. One of the chief functions of the Committee was the distribution of books and pamphlets presenting one side of national legislative issues (Rep. p. 1). The report states (p. 2):

The distribution of printed material to influence legislation indirectly \* \* \* is the basic function of the Committee for Constitutional Government.

After enactment of the Lobbying Act, the Committee for Constitutional Government adopted a policy of accepting payments of over \$490 only if the contributor specified that the funds be used for the distribution of one or more of the committee's books and pamphlets. It then applied the term "sale" to such receipts and did not report them as

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<sup>1</sup> This registration, pursuant to the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270) was independently proved at the trial (R. 14-17). Respondent showed that his registration was under protest (Defendant's Exhibits 1-6, R. 124-130).

contributions under the Lobbying Act<sup>2</sup> (Rep. pp. 1-2).

The report also shows that, when respondent appeared, pursuant to the subpoenas referred to in the indictment, he repeatedly stated that, while he would give the total income received from the sale of books, and records of loans except those used for the promotion of two books (Rep. pp. 7, 8, 10, 16), he would not supply information as to the identity of purchasers of books and pamphlets (Rep. pp. 7, 8, 9, 10, 12, 14, 15, 16, 17). He maintained that none of the books or pamphlets of the Committee for Constitutional Government dealt with specific legislation (Rep. pp. 9-10, 14), although he admitted that, when the Taft-Hartley Act was under discussion, it published and distributed a book called "Labor Monopolies or Freedom," of which all members of Congress received a copy (Rep. p. 11). He testified that about 90 per cent of the purchasers shipped the books themselves but testified that others designated types of individuals, such as "farm leaders" as recipients (Rep. p. 12). He gave as an example the case of one donor who paid to send to 15,550 libraries a book called *Compulsory Medical Care*. He said he was holding back distribution while he was "looking around now for another donor to send a copy to 15,000 editors, because we wish that book to hit the editors on the same day that the library gets it, because the edi-

<sup>2</sup>The Lobbying Act requires disclosure of contributions of \$500 or more. Section 305, 2 U.S.C. 264.

tor may be moved to say something about it, and build up interest in it."° (Rep. pp. 12-13.) He testified that a woman from Toledo gave him \$2,000. for distribution of a book called *The Road Ahead*, but he refused to furnish her name (Rep. p. 12).<sup>3</sup>

The Report states (pp. 2-3)—

Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Committee for Constitutional Government, Inc., is evading or violating the letter or the spirit of the Federal Regulation of Lobbying Act by the establishment of class or contributions called "Receipts from the sale of books and literature," or whether they are complying with a law which requires amendments to strengthen it.

The policy of the Committee for Constitutional Government, Inc., of refusing to accept contributions of more than \$490 unless earmarked for books, etc., may also involve: (1) Dividing large contributions into installments of \$490 or less, and causing the records of the Committee for Constitutional Government to reflect receipt of each installment on a different date, and/or causing the records of the Committee for Constitutional Government to give credit for the several installments, to various relatives and associates of the actual contributor. (2) Causing the Committee for Constitutional Government's records as to

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<sup>3</sup> This refusal forms the basis of count 7.

"Contributions" to reflect less than the total amount of contributions actually received, by labeling some part of such funds as payments made for printed matter.

Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Federal Regulation of Lobbying Act requires amendment to prevent division of large contributions into installments, or to prevent the crediting of contributions to others than the real contributor, or to prevent the use of other subterfuges.

The trial court ruled as a matter of law that the Select Committee was a validly constituted committee of Congress, and that the records and information requested, as alleged in the counts of the indictment under consideration, were pertinent to the inquiry (R. 175). It submitted the issue of wilful refusal to the jury (R. 176-178). Upon respondent's conviction, he was sentenced to pay a fine of \$1,000 and to imprisonment for six months, with execution of the prison sentence suspended and respondent placed on probation (R. 10).

On appeal the judgment of conviction was reversed (R. 224-225), by a divided court, on the ground that the Select Committee had no authority to compel production of the information which respondent refused to furnish. The majority of the court below ruled that Congress "has no power in respect to efforts to influence public opinion" (R.



202), and hence that the term "lobbying activities," as used in the House Resolution creating the Select Committee, must be held to mean lobbying in the sense of direct contact with Congressmen, and "did not purport to convey power to investigate efforts to influence public opinion" (R. 205). Accordingly, the majority ruled (R. 205)—

We are of the opinion that the demand made upon appellant for the names of purchasers of books from his concern was outside the terms of the authority of the Buchanan Committee, since the public sale of books and documents is not "lobbying."

The majority also held that there was no issue in the case as to whether the information was sought to ascertain possible subterfuges to evade the Lobbying Act, because no consideration was given to other financial records admittedly produced by respondent. It thought such other data would have to be considered in determining whether the names of purchasers would be relevant on the issue of subterfuge (R. 199-200).

The dissenting judge was of the view that both the report citing respondent and the fuller hearings before the committee established the pertinency of the information sought (R. 210-215). He rejected the basic premise of the majority opinion that indirect lobbying was not within the scope of the Select Committee, pointing out that any "concept of 'lobbying activities' which ignores



the realism of the day is an archaic one" (R. 217).  
The dissenting opinion states (R. 218):

Congress, through the Buchanan Committee, was concerned with a perennial problem in our democracy—how to deal with highly organized pressure groups, and the distortions and evils they sometimes bring in their wake, and how to distinguish such groups from individual citizens petitioning their representatives. Neither direct nor indirect lobbying is an evil and a danger, but either can become so, if plainly or subtly dishonest methods are used to distort the legislative function. \* \* \* I reject the notion that because Congress may not constitutionally prohibit indirect lobbying activities, it is without power to provide any measure of protection for itself and the public from its abuse. And here, since the Buchanan Committee had strong reason to believe that the abuse had already arisen, the attending circumstances were clearly pertinent to its inquiry. \* \* \*

#### REASONS FOR GRANTING THE WRIT

1. The basic premise of the majority opinion below is that Congress is without constitutional power even to inquire into organized efforts to influence public opinion for or against legislation. The opinion makes it clear that the narrower holding, that Congress did not authorize such inquiry, is based on the broader assumption that grant of such power would have been unconstitutional. The case thus involves a fundamental issue as to the power of

Congress to inquire into one of the most important elements in the democratic processes, the moulding of public opinion. The decision below, in preventing inquiry into such matters, unduly limits the power of Congress to deal with the problem of how to keep truly free the very right upon which the decision below purports to rest, the right to freedom of expression.

As the dissenting opinion points out, the problem of reconciling freedom of expression with the existence of highly organized, heavily financed pressure groups, employing newly developed techniques of public relations, has been a matter of congressional and executive concern, at least since 1913. (See H. Rep. 113, 63d Cong., 2d sess., p. 5.) In the 1920's, the extensive campaign of the electric power industry against government regulation was, at the request of the Senate, investigated by the Federal Trade Commission (S. Doc. 92, pt. 71A, 70th Cong., 1st sess., p. 18). In 1935 the Senate directed an "investigation of all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly" in connection with the Public Utility Holding Company Act (S. Res. 165 and 184, 74th Cong., 1st sess.). In 1938, the Civil Liberties Committee of the Senate Committee on Education and Labor, in the course of its investigation in the labor field, had occasion to consider the propaganda efforts of organized employer groups (S. Rep. 6, pt. 6, 76th

Cong., 1st sess., pp. 218-219). The Temporary National Economic Committee, established in 1938, published in 1941 its monograph No. 26, entitled, "Economic Power and Political Pressures" which dealt with the problem of lobbying and propaganda techniques, and recommended disclosure of sources of funds and expenditures for public relation services, advertising, radio, etc. (p. 194). The Report of the President's Committee on Civil Rights (1947), pp. 52-53, recommended that the Government "provide a source of reference" for "accurate information" as to "those who are active in the market place of public opinion."

The crux of the problem was stated in the report of the Joint Committee on the Organization of Congress which proposed the Federal Lobbying Act (S. Rep. 1011, 79th Cong., 2d sess., p. 26), as follows:

We fully recognize the right of any citizen to petition the Government for the redress of grievances or freely to express opinions to individual Members or to committees on legislation and on current political issues. However, *mass means of communication and the art of public relations have so increased the pressures upon Congress as to distort and confuse the normal expressions of public opinion.*

A pure and representative expression of public sentiment is welcome and helpful in considering legislation, but *professionally inspired efforts to put pressure upon Congress*

from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. \* \* \*

Thus Congress may, if it deems such a course necessary to preserve the integrity of free expression, require some disclosure, not only by those organizations like the Committee for Constitutional Government, which receive money for the purpose of influencing federal legislation, but also by other organizations, such as the alleged purchasers of the Committee's books, which themselves distribute literature designed to influence public opinion regarding federal legislation. It is possible, for example, that anonymous distribution could be prohibited. It is possible that corporations spending corporate funds for such purpose could be required to report such fact to their stockholders, or to Congress.

It is unnecessary to speculate further since no actual legislation is here involved. It is sufficient that the subject matter under investigation by the select Committee was clearly a matter significant to the public welfare into which Congress could legitimately inquire. The doctrine of *Kilbourn v. Thompson*, 103 U.S. 168, that Congress may not inquire into private affairs, thus has no application here. *McGrain v. Daugherty*, 273 U.S. 135, 177-179. Congress could properly inquire broadly into organized efforts to influence public opinion in federal legislation.



Since, as noted above, the conclusion that the Select Committee was not authorized to investigate lobbying through organized efforts to influence public opinion was based on the theory that such an interpretation of the resolution would raise constitutional issues, the conclusion as to the powers of the Committee falls with its premise. The majority opinion below admits that there is some justification for the argument that the words "lobbying activities" in the resolution were intended to encompass the full scope of the Lobbying Act, and admits that, in terms, the act applies to those who receive money "to influence, directly or indirectly" federal legislation. Section 307(b); 2 U.S.C. 266 (b). We think it is clear, both from the language and the legislative history set forth above, that Congress meant by this language to cover organized professional attempts to influence public opinion and, as we have shown, that Congress had constitutional power to do so. Hence, the resolution authorizing inquiry by the Select Committee had at least the same scope.

2. If organized efforts to influence public opinion on federal legislation were a proper subject of investigation by the Select Committee, then, as the majority opinion below itself tacitly assumes, there can be no doubt that the information which petitioner refused to furnish was pertinent to the inquiry, irrespective of any issue as to possible subterfuges under the Lobbying Act. The Committee was seeking only the names of so-called



"purchasers" who were buying in large quantities for distribution to others. The alleged purchasers were thus persons who were themselves entering the market for public opinion. Congress had a right to know who such people were and to learn in what manner they were conducting their activities.

No question of the First Amendment is involved. As the Court of Appeals for the Second Circuit said with respect to a challenge to the authority of a congressional committee to investigate subversive activities, in *United States v. Josephson*, 165 F. 2d 82, 91, certiorari denied, 333 U.S. 838:

The power of Congress to gather facts of the most intense public concern \* \* \* is not diminished by the unchallenged right of individuals to speak their minds within lawful limits.

The investigation ~~here~~ involved restrains no one from speaking, writing or publishing his views in any manner. The inquiry does not extend to private views as such. The inquiry goes only to those who have taken action to disseminate their views to others, and merely seeks to obtain information about the manner in which such action is taken. We submit, therefore, that the disclosure called for by the Committee in no way impinges on the First Amendment rights, either of the Committee for Constitutional Government, or of the quantity purchasers of its books.

As noted above, the principle that those who seek to capture a market, whether for their wares or their opinions, may be compelled to disclose to the public the fact of such interest, is a long-standing concept which is in aid of, and not a detriment to, the rights protected by the First Amendment. The underlying theory of democratic government in that it is for the people to judge the measures they deem necessary for their welfare. In forming their judgment, the people are entitled to know the interest of those who seek to convince them. As the dissenting judge below stated (R. 224):

If legislation requiring financial disclosure is free from objection on First Amendment grounds, compulsion of these disclosures by legislative inquiry is likewise free from the same objection.

In addition, as the dissenting opinion below also points out, the questions which respondent refused to answer were pertinent to the Select Committee's inquiry because the Committee had reason to believe that the Lobbying Act was being evaded by the device of having contributions made in the form of purchases. When the pattern of accepting payments of more than \$490 only in the form of purchases of books is judged in the light of the requirement of the Federal Lobbying Act for reports on contributions of more than \$500, it is evident that the scheme was one to avoid the disclosure requirements of that act. Certainly Congress had

a right to inquire into any possible loopholes in its recently enacted legislation. See *Sinclair v. United States*, 279 U.S. 263, 297-298.

We submit the majority below was in error in holding that the pertinency of questions as to the identity of alleged purchasers to the issue of evasion could not be judged without consideration of the other financial data which respondent did produce. We think it is evident on its face that the alleged purchases were necessarily a method of supporting the committee. The chairman of the Select Committee stated that the total amount of loans and contributions in the data furnished the Select Committee aggregated only about \$25,000 in contrast to evidence that the activities of the Committee for Constitutional Government exceeded \$1,000,000 a year (Rep. p. 16).

Under these circumstances, there was ample basis for the Select Committee's conclusion that a statement of the amounts received for the sale of books would not be adequate to enable it to judge if contributions were being accurately reported; that it needed the names to determine whether large contributions were being divided into installments or whether alleged purchases were in reality camouflaged contributions. The court below was not warranted in overruling the committee's judgment as to the information it needed to study the practical working out of the recent lobbying legislation.

## CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

MAY 1952.

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**No. 87**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1952**

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**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**EDWARD A. RUMELY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT**

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**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 87

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD A. RUMELY

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions in the Court of Appeals (R. 193-224) are reported at 197 F. 2d 166.

## JURISDICTION

The judgment of the Court of Appeals was entered April 29, 1952 (R. 224-225). The petition for a writ of certiorari was filed on May 28, 1952, and was granted on October 13, 1952 (R. 227). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether information sought by the House Select Committee on Lobbying Activities as to the names of those who gave sums of over \$500 to the Committee for Constitutional Government, Inc., an organization registered under the Lobbying Act, for the purchase or distribution of books of that organization, was pertinent to an inquiry by the Committee into organized efforts to influence public opinion in regard to federal legislation.

2. Assuming that the information sought was otherwise pertinent to the inquiry, whether the House of Representatives had constitutional power to authorize its Committee to make such an inquiry and to compel the disclosure of the information sought.

## STATUTES INVOLVED

R. S. 102, as amended, 52 Stat. 942, 2 U.S.C. 192 provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House; \* \* \* or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100, and imprisonment in a common jail, for not less than one month nor more than twelve months.

The provisions of the Federal Regulation of Lobbying Act of August 2, 1946, 60 Stat. 839, 2 U.S.C. 261, *et seq.*, are set forth in Appendix A, *infra*, pp. 82-89.

#### STATEMENT

A. *The Trial*.—Respondent was convicted on counts one, six, and seven of an indictment charging wilful refusal to produce records and give testimony before the Select Committee on Lobbying Activities of the House of Representatives, in violation of R. S. 102, 2 U.S.C. 192 (R. 2-4, 181). The Committee had been created by resolution of the House of Representatives (H. Res. 298, 81st Cong., 1st sess., Gov. Ex. 2, R. 18, 188), authorizing it to conduct a study and investigation, *inter alia*, of "all lobbying activities intended to influence, encourage, promote or retard legislation."<sup>1</sup>

Count one charged that respondent wilfully refused to produce records, duly subpoenaed, of the Committee for Constitutional Government, Inc. (CCG), showing the name and address of each person from whom a total of \$1,000 or more had been received by the Committee from January 1, 1947, to May 1, 1950, for any purpose, including receipts from the sale of books and pamphlets. Count six charged a similar offense as to a subpoena calling for the names and addresses of those from whom the Committee on Constitutional Government had received \$500 or more, and count

<sup>1</sup> The full text of the Resolution is reprinted at R. 188.

seven charged wilful refusal to give the name of a woman from Toledo who gave \$2,000 for distribution of a book called *The Road Ahead*. (R. 2-4.)

At the trial, the Government proved that the Committee for Constitutional Government and respondent as agent therefor had registered under the Lobbying Act after its enactment in 1946 (R. 15-17), such registration subsequently being shown to have been under protest (R. 23). It introduced in evidence the House Resolution creating the Select Committee (Gov. Ex. 2, R. 18) and the certification by the Speaker of the House of the Committee's Report citing respondent for contempt (Gov. Ex. 4, R. 19). It proved the issuance of the subpoenas and the refusal of respondent to answer, through the testimony of counsel for the Select Committee (R. 20-35) during the course of which reference was made to two printed volumes of the hearings before the Select Committee which were stipulated by counsel for respondent to be correct (R. 21).<sup>2</sup>

Respondent took the stand and introduced into evidence, as bearing on the subject of ability to

<sup>2</sup> "Mr. HITZ [Government Counsel]: I may say, Your Honor, that for the purposes of this trial it has been agreed between Mr. Burkinshaw and myself that the two volumes, Part 4 and Part 5 of the hearings, insofar as they relate to Mr. Rumely, are correct and we will not go to the reporter or to any shorthand notes for that purpose. Is that right?"

"Mr. BURKINSHAW [Counsel for Rumely]: That is right, absolutely."



comply with the subpoena,<sup>3</sup> a statement he had made before the Committee showing the efforts that had been made to comply with the subpoena and the extent of financial data furnished (R. 111-113). He testified that CCG furnished the Select Committee with all the information it sought except the names of the purchasers of books (R. 140-141).

The trial court ruled as a matter of law that the Select Committee was a validly constituted committee of Congress, and that the records and information requested, as called for in the counts of the indictment under consideration, were pertinent to the inquiry (R. 175). The issue of willful refusal was submitted to the jury (R. 176-178). Upon respondent's conviction, he was sentenced to pay a fine of \$1,000 and to imprisonment for six months, with execution of the prison sentence suspended and respondent placed on probation (R. 10).

*B. The Committee Report.*—The background of the subpoenas and of the questions asked respondent is set forth in full in a Report of the Select Committee (H. Rep. 3024, 81st Cong., 2d sess.). This Report was certified to the United States Attorney for the District of Columbia pursuant to a resolution of the House of Representatives, in accordance with the provisions of Section 104 of

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<sup>3</sup> Respondent offered to show that his refusal to answer was in good faith (R. 84-85), but the court had previously ruled that good faith, in the sense of motive, was immaterial, the issue being whether respondent's refusal was willful (R. 73-77). The court allowed respondent to testify to facts showing physical impossibility to comply with the subpoenas (R. 97).

the Revised Statutes as amended, 2 U.S.C. 194; Gov. Ex. 4, R. 19.

According to that Report, the Committee for Constitutional Government, Inc., and respondent, its executive secretary, have been registered as lobbyists since October 7, 1946,<sup>4</sup> and CCG reported spending approximately \$2,000,000 during that period. One of the chief functions of CCG was the distribution of books and pamphlets presenting one side of national legislative issues (Rep. p. 1). The Report states (p. 2):

The distribution of printed material to influence legislation indirectly \* \* \* is the basic function of the Committee for Constitutional Government.

The Report also records that after enactment of the Lobbying Act the Committee for Constitutional Government adopted a policy of accepting payments of over \$490 only if the contributor specified that the funds be used for the distribution of one or more of its books and pamphlets. It then applied the term "sale" to such receipts and did not report them as contributions under the Lobbying Act (H. Rep. pp. 1-2). The Lobbying Act requires disclosure of contributions of \$500 or more. Section 305, 2 U.S.C. 264; *infra*, pp. 84-85.

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<sup>4</sup> This registration, pursuant to the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270), was independently proved at the trial (R. 14-17). Respondent showed that his registration was under protest (Defendant's Exhibits 1-6, R. 124-130).

The Report also shows that, when respondent appeared pursuant to the subpoenas referred to in the indictment he repeatedly stated that, while he would give the total income received from the sale of books and records of loans except those used for the promotion of two books (Rep. pp. 7, 8, 10, 16), he would not supply information as to the identity of purchasers of books and pamphlets (Rep. pp. 7, 8, 9, 10, 12, 14, 15, 16, 17). He maintained that none of the books or pamphlets of the Committee for Constitutional Government dealt with specific legislation (Rep. pp. 9-10, 14 (although he admitted that, when the Taft-Hartley Act was under discussion, the Committee published and distributed a book called "Labor Monopolies or Freedom," of which all members of Congress received a copy (Rep. p. 11). He testified that about 90 per cent of the purchasers shipped the books themselves, but testified that others designated types of individuals, such as "farm leaders" as recipients (Rep. p. 12). He gave as an example the case of one donor who paid to send to 15,550 libraries a book called *Compulsory Medical Care*. He said he was holding back distribution while he was "looking around now for another donor to send a copy to 15,000 editors, because we wish that book to hit the editors on the same day that the library gets it, because the editor may be moved to say something about it, and build up interest in it." (Rep. pp. 12-13). He testified that a woman from Toledo gave him \$2,000 for distribution of a

book called *The Road Ahead*, but he refused to furnish her name (Rep. p. 12).<sup>5</sup>

The Report states (pp. 2-3) —

Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Committee for Constitutional Government, Inc., is evading or violating the letter or the spirit of the Federal Regulation of Lobbying Act by the establishment of [a] class [of] contributions called "Receipts from the sale of books and literature", or whether they are complying with a law which requires amendments to strengthen it.

The policy of the Committee for Constitutional Government, Inc., of refusing to accept contributions of more than \$490 unless earmarked for books, etc., may also involve: (1) Dividing large contributions into installments of \$490 or less, and causing the records of the Committee for Constitutional Government to reflect receipt of each installment on a different date, and/or causing the records of the Committee for Constitutional Government to give credit, for the several installments, to various relatives and associates of the actual contributor. (2) Causing the Committee for Constitutional Government's records as to "Contributions" to reflect less than the total amount of contributions actually received, by

<sup>5</sup> This refusal forms the basis of count 7.

labeling some part of such funds as payments made for printed matter.

Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Federal Regulation of Lobbying Act requires amendment to prevent division of large contributions into installments, or to prevent the crediting of contributions to others than the real contributor, or to prevent the use of other subterfuges.

*C. The Decision Below.*—On appeal, the judgment of conviction was reversed (R. 224-225) by a divided court, on the ground that the Select Committee had no authority to compel production of the information which respondent refused to furnish. The majority of the court ruled that Congress "has no power in respect to efforts to influence public opinion" (R. 202), and hence that the term "lobbying activities," as used in the House Resolution creating the Select Committee, must be held to mean lobbying in the sense of direct contact with Congressmen, and "did not purport to convey power to investigate efforts to influence public opinion" (R. 205). Accordingly, the court ruled (R. 205)—

We are of the opinion that the demand made upon appellant for the names of purchasers of books from his concern was outside the terms of the authority of the Buchanan Com-



mittee, since the public sale of books and documents is not "lobbying."

The court also held that there was no issue in the case as to whether the information was sought to ascertain possible subterfuges to evade the Lobbying Act, because no consideration was given to other financial records admittedly produced by respondent. It thought such other data would have to be considered in determining whether the names of purchasers would be relevant on the issue of subterfuge. (R. 199-200.)

The dissenting judge was of the view that both the Report citing respondent and the fuller hearings before the Select Committee established the pertinency of the information sought (R. 210-215). He rejected the basic premise of the majority opinion that indirect lobbying was not within the scope of the Select Committee, pointing out that any "concept of 'lobbying activities' which ignores the realism of the day is an archaic one" (R. 217). The dissenting opinion states (R. 218):

Congress, through the Buchanan Committee, was concerned with a perennial problem in our democracy—how to deal with highly organized pressure groups, and the distortions and evils they sometimes bring in their wake, and how to distinguish such groups from individual citizens petitioning their representatives. Neither direct nor indirect lobbying is an evil and a danger, but either can become so, if plainly or subtly dishonest methods are used to distort the legislative function. \* \* \*

I reject the notion that because Congress may not constitutionally *prohibit* indirect lobbying activities, it is without power to provide any measure of protection for itself and the public from its abuse. And here, since the Buchanan Committee had strong reason to believe that the abuse had already arisen, the attending circumstances were clearly pertinent to its inquiry. \* \* \*

#### SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the information sought from respondent by the House Select Committee on Lobbying Activities was not pertinent to the inquiry being conducted by that Select Committee.
2. In holding that the House Select Committee on Lobbying Activities was not authorized by Resolution 298 to inquire into organized efforts by groups or entities like the Committee for Constitutional Government to influence public opinion in regard to federal legislation.
3. In holding that respondent was not required to supply the information called for by the Select Committee.
4. In holding that the pertinency of the information sought from respondent by the Select Committee must be determined solely on the basis of evidence formally introduced and admitted by the District Court.
5. In failing to hold that the House of Representatives had constitutional power to authorize

the Select Committee to inquire into organized efforts by groups or entities like the Committee for Constitutional Government to influence public opinion in regard to federal legislation.

6. In failing to hold that the House of Representatives had constitutional power to authorize the Select Committee to demand the information sought from respondent.

7. In reversing the respondent's conviction and ordering the indictment dismissed.

#### SUMMARY OF ARGUMENT

##### I

Congress may unquestionably investigate in aid of its legislative powers. *McGrain v. Daugherty*, 273 U.S. 135, 170-176; *Sinclair v. United States*, 279 U.S. 263, 291-294. As with most investigations the inquiry may have a broader reach than the substantive power which Congress may or can exert so that Congress can have full opportunity to determine the advisability and need for legislation. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186. Congress has also been held empowered to investigate the election and conduct of its members, and the influences brought to bear upon them. E.g., *In re Chapman*, 166 U.S. 661.

Special constitutional or evidentiary privileges aside, the witness cannot claim immunity from responding to a demand pertinent to a lawful Congressional inquiry on the ground that it relates to private matters. If he refuses to respond, he is guilty of a violation of R. S. 102 (*supra*, p. 2).

if the Committee's demand was "pertinent", and may be punished accordingly. In the criminal proceeding, "pertinency" is determined by the trial judge as one of law, and a deliberate, intentional refusal to respond is sufficient for conviction, whatever the witness' motive or "good faith". *Sinclair v. United States, supra*, at pp. 298-9, 299.

## II

The information sought from respondent by the Select Committee was "pertinent" to its inquiry (constitutional questions aside).

A. The Committee had been authorized by the House of Representatives (in Resolution 298) to "conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation" (R. 188). On its face, this was a broad authorization and would seem plainly to have made pertinent inquiry into the major sources of the finances of all lobbyists registered under the Federal Regulation of Lobbying Act, which covers direct or indirect influences on the passage or defeat of federal legislation. *Infra*, pp. 85-88. The immediate legislative history of the enabling resolution (Resolution 298) likewise affirmatively indicates the broad purpose to probe not only the direct button-holing of legislators but also into deliberate organized influencing of "public opinion" with respect to federal matters.

B. The propriety of this construction of Resolu-

tion 298 is underlined by the history of past Congressional inquiries into "lobbying". This was the fourth great investigation of lobbying since 1913. From the first of these, the Committees have noted that significant dangers from lobbying grow out of indirect activities, out of the artificial creation of "public opinion." And although each of the earlier investigations resulted from what Congress regarded as particularly glaring incidents of lobby abuse, and lost momentum as each incident faded from public attention, there was nonetheless consistent recognition from each inquiring committee that the dimensions of the "lobby problem" were vague as well as large, and included indirect influencing. H. Rep. 113, 63rd Cong., 2d Sess., printed in 51 Cong. Rec. 565-584. See S. Rep. 43, pts. 4, 5, 7, 71st Cong., 1st Sess.; Hearings, Special Senate Committee to Investigate Lobbying Activities, 74th Cong., 1st and 2nd Sess., 75th Cong., 3rd Sess., pp. 1014-1015. See Lane, *Some Lessons from Past Congressional Investigations of Lobbying*, 14 Pub. Op. Quar. 14 (1950).

Indirect lobbying was also recognized as a phase of the problem of good representative government in other public investigations. Aspects of it were dealt with in 1938 by the Civil Liberties Committee of the Senate Committee on Education. S. Rep. 6, 76th Cong., 1st Sess. One of the monographs of the Temporary National Economic Committee, an investigation into concentrated economic power, dealt generally with the indirect political pressures exerted by the groups it was investigating. Mono-



graph No. 26, "Economic Power & Political Pressures." The Report of the President's Committee on Civil Rights (1947), pp. 52-53, called attention to the need of controlling, at least by publicity, those who were "active in the market place of public opinion."

Finally, the Federal Lobbying Act of 1946 is particularly important in understanding the legislative background of the present investigation. It represented the first federal statute to deal squarely with lobbying, and it was broad in scope. The Select Committee was undoubtedly to investigate its operation. But of equal importance is the fact that the Lobbying Act was part of the Legislative Reorganization Act of 1946, which attempted in a number of ways to advance the legislative process by improving the presentation to, and consideration by, Congress of facts and opinions.

C. In carrying on its inquiry under the House Resolution, the Select Committee construed its authority broadly, as its terms and background warranted. The Committee heard testimony which, independently, indicated to it that the problem it was investigating was of large proportions. It was told that the button-holing-of-Congressmen approach to lobbying was no longer its most important aspect. Dollarwise, at least, by far the greater part of efforts to influence legislation were said to be indirect efforts to "make" public opinion, which, in turn, would result in the necessary support for legislation. The Committee was told also that the processes of public opinion formation made

it peculiarly susceptible and responsive to these organized pressures.

Witnesses told the Select Committee of various facts which appeared to show that legislative opinion "manufacturers" were having some effect, although the scope of the effect was difficult to measure. It was told, for instance, that there was evidence of a marked discrepancy between opinion as reflected by Congressional mail, and as it was reflected by impartially administered public opinion polls. Other evidence indicating the artificial creation of supposed blocs of opinion was brought to its attention. The Select Committee also concluded, on the basis of its hearings, that the mere sums of money being spent for the purpose of influencing legislation raised questions as to whether these efforts were not successful in distorting the appearance of "public opinion" to Congress.

On the other hand, the Select Committee also considered testimony that the so-called "indirect lobbying" groups had very valuable positive functions to perform; that they served to balance the arbitrarily geographical representation in Congress, and served importantly as sources of information for Congress on public issues.

With this general survey as background, the Select Committee then undertook to study its problem more specifically, by inquiry into particular lobbies, drawn to represent variant political outlooks and organizational techniques. In the course of this study, the Select Committee came to the Committee for Constitutional Government, which ac-

cording to the Select Committee's information, expended considerable sums. In investigating CCG's methods of influencing public opinion, and particularly its response to the 1946 Lobbying Act, the Select Committee inquired about those who were spending large sums to support its work.

D. In this context—including the words of Resolution 298 and its immediate legislative history, the scope of previous inquiries into "lobbying", the Select Committee's own understanding of its mission, and the particular evidence presented to it—it is undeniable that the Committee was empowered to probe into indirect lobbying, and in that connection to consider the operation of the Regulation of Lobbying Act of 1946.

In that type of inquiry, the demands for the information here at issue were clearly pertinent, on any theory. If consideration be restricted to the fact that respondent and CCG had registered under the Lobbying Act, it is plain that the Committee was entitled to know if they had sought to evade the statutory requirements by classing "contributions" as "purchases", and whether CCG's activities revealed need for the Act's amendment, one way or another. But the Court may consider, in addition to the fact of registration, the data and details on respondent and CCG, bearing on possible evasion of the Lobbying Act and need for further legislation, which are contained in the Committee's Report Citing Edward A. Rumely, and in its hearings. Though not formally introduced into evidence, these materials were before the trial

judge, and may well have been considered by him. In any case, this Court can weigh them since "pertinency" is a matter of law for the judge, not the jury, and no prejudice to respondent can possibly result. These documents reveal, in elaborate and precise detail, the relevancy of the demands made by the Committee—particularly in showing that CCG may have attempted to evade the Lobbying Act's requirement to report all contributions of over \$500 by characterizing contributions of those amounts as mere "purchases."

### III

The Court of Appeals erroneously thought that the Select Committee's demands infringed the First Amendment and therefore could not possibly be pertinent to any lawful inquiry. In our view, the inquiry was within Congress' general competence, and the First Amendment interposes no bar.

A. The Committee certainly had general legislative jurisdiction if any valid legislation could stem from its inquiry. There is no doubt that it could recommend legislation which would, the First Amendment apart, be within its competence to control its own activities or would be sanctioned by the commerce or postal powers. For instance, it could consider and recommend some type of disclosure legislation, a type of regulation which has been frequently used to safeguard a public interest. *E.g., Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (Corrupt Practices Act); *Electric Bond & Share Co. v. Securities & Exchange Com-*

mission, 303 U.S. 419, 439 (utility regulation); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 72-77 (Ku Klux Klan); the Regulation of Lobbying Act of 1946. Unless it could be said, definitively and *a priori*, that Congress is wholly foreclosed by the First Amendment from using this device, in any form, with respect to CCG and its supporters, the Committee was plainly acting in aid of a legislative function. Conversely, if there was a possibility of valid legislation issuing from the Committee, it is wholly irrelevant that unconstitutional legislation might actually be recommended or adopted.<sup>6</sup>

B. There is no interference with First Amendment rights, either in disclosure legislation which the Select Committee could recommend or in its demands upon respondent. Disclosure of the names of CCG's larger purchasers—either as a result of legislation or in the course of inquiry—imposes no *legal* sanctions of any kind on the expression of ideas by anyone. Nor does respondent claim that it does. His concern is that disclosure of these facts will lead to an unfavorable public reaction which will deter CCG's supporters from continuing as "purchasers."

1. This may, indeed, be an actual "restraint," but it is not an abridgment of First Amendment rights. Self-censorship or self-restraint in expression of ideas, stemming from but going beyond

<sup>6</sup> We also submit that Congress' power over its own operations and to inform the public would also support the Committee's inquiry, even if there were no legislative purpose.



a legal requirement (*e.g.*, the slander and libel laws), is a common result of timidity, caution, care, or the desire to avoid controversy or litigation, but this type of voluntary, tangential restraint has never been thought within the First Amendment, even where it flows from fear of a statutory penalty or other legal sanction. *A fortiori*, there is no abridgment here where the feared sanction is concededly not legal at all, but social or economic pressure consequent upon disclosure of true facts. At least where disclosure serves a legitimate purpose, it cannot invade First Amendment rights.

2. Whatever its wisdom as a legislative policy, there can be no denial that compulsory disclosure relating to organized groups seeking to influence federal legislation could advance legitimate public interests, as Congress would see them. For forty years, Congress has been concerned with the relationship between (a) fact-finding and opinion-finding, as bearing on the legislative process, and (b) the groups and organizations which seek to influence Congressional action, directly or through the molding of public opinion. Congress' own studies, and those of other responsible students, have indicated that there is at least reasonable basis for the belief that Congress' functioning has been impaired by lack of knowledge of the character, sponsorship, and activities of these groups and organizations. Disclosure, it is thought, will aid the reaching of wiser judgments on federal legislation by helping Congress and the electorate to evaluate the facts and arguments pressed on

Congress and to appraise the true scope of the blocs of opinion said to support or oppose a particular bill or project. The aim of most disclosure proposals, which has not been to silence or prohibit ideas but to understand their sponsorship, is consonant with, rather than contrary to, the First Amendment.

3. The same conclusion is reached if the self-restraint consequent upon disclosure is viewed as a legal, rather than a social or voluntary, restraint. The restraint is, at most, a minor and limited one. On the other hand, the public purpose to be served by disclosure—betterment of the legislative process—must be characterized as fundamental and important. Any fair balance would cause the public interest to outweigh the private, by far. *Cf. Pennekamp v. Florida*, 328 U.S. 331, 336; *United Public Workers v. Mitchell*, 330 U.S. 75, 94-103; *Prince v. Massachusetts*, 321 U.S. 158, 160-170. U

4. Even if it be assumed, contrary to our view, that any disclosure *legislation* would probably invade First Amendment rights, the Select Committee's *ad hoc* demand for disclosure would be valid. A committee has power to elicit all the relevant facts in order to determine the need or possibility of constitutional legislation. If, as here, it acts in good faith, it can proceed to find out all the facts, at least until the facts conclusively demonstrate the unlikelihood or impossibility that a valid statute could be enacted.

C. There is no interference with any protected "right of privacy" under the Fifth Amendment,

either in disclosure legislation applicable to active vendors "in the market place of public opinion", or in the Committee's demand that respondent supply the information it requested.

## ARGUMENT

### I

#### Introduction:—The General Scope of the Congressional Power of Inquiry

1. The power of either branch of Congress to institute investigations and to compel testimony with a view to the possible exercise of the legislative function is now indisputable. *United States v. Norris*, 300 U. S. 564, 575; *Sinclair v. United States*, 279 U.S. 263, 291-294; *McGrain v. Daugherty*, 273 U.S. 135, 170-176; *Marshall v. Gordon*, 243 U.S. 521, 533-545; *Journey v. MacCracken*, 294 U.S. 125, 144; *Tenney v. Brandhove*, 341 U.S. 367, 377. The need for the power stems from the very nature of the legislative process, and the need has increased in proportion to the expanding scope and complexity of the federal government's functions. As this Court said in the *McGrain* case, 273 U.S. at 175:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the

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<sup>1</sup> *Kilbourn v. Thompson*, 103 U.S. 168, held that the resolution authorizing the investigation there involved contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had; and that the House of Representatives was seeking to exercise judicial rather than legislative power. See 273 U.S., at 170-1.

legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

This power of inquiry enables Congress to elicit the facts bearing on all the subjects within its competence under the Constitution. It is not restricted to inquiring into those facts which prove the need for new legislation, or modification of existing legislation, nor is it limited to the precise area which Congress has authority to regulate or prohibit. Cf. *United States v. Josephson*, 165 F. 2d 82, 90-91 (C.A. 2), certiorari denied, 333 U.S. 838; *Townsend v. United States*, 95 F. 2d 352, 361 (C.A.D.C.), certiorari denied, 303 U.S. 664. The power to investigate is almost always broader than the substantive power which may or will be exerted by the investigating agency, for not until the whole region of facts has been canvassed can it be determined where the definitive boundaries of regulation should be drawn. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501; Morgan, *Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited* (1949), 37 Calif. L. Rev. 556, 561-5. It is just as important for Congress to be informed of facts which would show proposed or

possible legislation to be undesirable or unnecessary as it is for it to know the circumstances calling for affirmative action on its part. In many circumstances, such as in areas impinging on freedom of speech or involving interstate commerce, Congress' power to legislate may even depend upon the existence or non-existence of facts which can be shown only through a legislative inquest. Congress, for instance, cannot tell whether there is need or constitutional basis for regulating "propaganda" or pressure on legislators until it learns what are the scope, intent, and effect of the activities thought to form "propaganda" or pressure. Once those facts are known, but not before, the extent and terms of legislation which is both desirable and constitutional can be properly decided.

2. Apart from the power of inquiry incident to its status as the national legislature, Congress also has a special interest in its own operations, and may use the power of inquiry (and compelled testimony) to investigate the election and conduct of its members, and the influences brought to bear on them. *Anderson v. Dunn*, 6 Wheat. 204 (attempted bribery of legislator); *In re Chapman*, 166 U.S. 661 (charges of corruption and improper conduct on part of Senators); *Barry v. United States ex rel: Cunningham*, 279 U.S. 597, 613-615, 619 (alleged expenditures, promises, etc., made to influence nomination of a candidate for Senator); *Reed v. County Commissioner*, 277 U.S. 376, 388 (the same); *United States v. Norris*, 300 U.S. 564, 573 (campaign expenditures of candidates for the Senate). Here, too, the power of inquiry is plenary



so that Congress can, if it desires, distinguish improper or dubious influences from those which are praiseworthy or proper.<sup>8</sup>

3. Aside from special constitutional or evidentiary privileges, a witness before a Congressional committee must respond to all demands pertinent to any inquiry within Congressional jurisdiction. He may, it is true, refuse to answer inquiries which are *solely* a delving into "personal and private affairs" (*Kilbourn v. Thompson*, 103 U.S. 168, 190, 195; *McGrain v. Daugherty*, 273 U.S. 135, 173; *Sinclair v. United States*, 279 U.S. 263, 294-4), but inquiries pertinent to matters which may properly be investigated by the Houses of Congress cannot be deemed to relate "merely to [the witness'] private or personal affairs," even though they call for disclosure of facts which would otherwise be his private and personal business. *McGrain v. Daugherty*, *supra*, at 177-180; *Sinclair v. United States*, *supra*, at 294-5, 296-8. As in the case of one called as witness in a judicial proceeding or served with a court-issued *subpoena duces tecum*, whose private affairs may be laid bare by questioning or by the documents produced, "the interests of privacy are there overbalanced by the interest in efficient government. That efficiency should be accorded judicial power and withheld from legislative power, is contrary to the dictates of public policy as well as

<sup>8</sup> Congress may also inquire into facts which might lead to an amendment of the Constitution or to impeachment of an executive or judicial officer. It may also be that Congress has authority to investigate for the sole purpose of bringing information to public attention. See *infra* pp. 64-66.

inimical to a theory of separate but equal governmental powers. The use of such evidence for a legitimate purpose within the scope of the power adducing it, can as well be presumed for legislatures as for courts." Landis, *Constitutional Limitations on the Congressional Power of Investigation*, (1926) 40 Harv. L. Rev. 153, 219. "Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations." *Townsend v. United States*, 95 F. 2d 352, 361 (C.A.D.C.), certiorari denied, 303 U.S. 664. "We must assume, for present purposes, that neither house will be disposed to exert the power [of inquiry] beyond its proper bounds, or without due regard to the rights of witnesses." *McGrain v. Daugherty*, 273 U.S. 135, 175-6. See also *Tenney v. Brandhove*, 341 U.S. 367, 377-378.

4. R. S. 102 (*supra*, p. 2), under which respondent was tried and convicted, provides "an alternative method of vindicating the authority of Congress to compel the disclosure of facts which are needed in the fulfillment of the legislative function." *United States v. Bryan*, 339 U.S. 323, 327. A crime is committed when a witness before a Congressional committee intentionally fails to comply with a proper demand for records by the committee (*United States v. Bryan, supra*) or intentionally refuses "to answer any question pertinent to the question under inquiry." To convict, the

United States must show that the records demanded or the questions asked are "pertinent" to the subject-matter of the inquiry, for, as stated above, a witness has a right to refuse to produce records or to answer queries which are not pertinent. *Sinclair v. United States*, 279 U.S. 263, 292, 296-7; *McGrain v. Daugherty*, 273 U.S. 135, 176. The question of "pertinency" under R.S. 102 is decided by the court as one of law, and is not to be left to the jury. It does not depend "upon the probative value of evidence." *Sinclair v. United States*, *supra*, at 298-9. A deliberate, intentional refusal to answer or produce is sufficient; "good faith" or action on the advice of counsel furnish no excuse. *Sinclair v. United States*, *supra*, at 299.<sup>9</sup>

<sup>9</sup> For a list of books and articles on legislative investigations, see Appendix B, *infra*, pp. 89-91.

Recent reported contempt cases involving Congressional inquiries include:—*United States v. Bryan*, 339 U.S. 323; *United States v. Fleischman*, 339 U.S. 349; *United States v. Josephson*, 165 F. 2d 82 (C.A. 2), certiorari denied, 333 U.S. 838; *Barsky v. United States*, 167 F. 2d 241 (C.A. D.C.), certiorari denied, 334 U.S. 843; *Eisler v. United States*, 170 F. 2d 273 (C.A. D.C.), certiorari granted, 335 U.S. 857, removed from docket, 338 U.S. 189, certiorari dismissed, 338 U.S. 883; *Marshall v. United States*, 176 F. 2d 473 (C.A. D.C.), certiorari denied, 339 U.S. 933; *Lawson v. United States*, 176 F. 2d 49 (C.A. D.C.), certiorari denied, 339 U.S. 934; *Kamp v. United States*, 176 F. 2d 618 (C.A. D.C.), certiorari denied, 339 U.S. 957; *Dennis v. United States*, 171 F. 2d 986 (C.A. D.C.), affirmed, 339 U.S. 162; *Morford v. United States*, 176 F. 2d 54 (C.A. D.C.), reversed, 339 U.S. 258; *Morford v. United States*, 184 F. 2d 864 (C.A. D.C.), certiorari denied, 340 U.S. 878; *Fields v. United States*, 164 F. 2d 97 (C.A. D.C.), certiorari denied, 332 U.S. 851; *Townsend v. United States*, 95 F. 2d 352 (C.A. D.C.), certiorari denied, 303 U.S. 664; cf. *Hearst v. Black*, 87 F. 2d 68 (C.A. D.C.).

## II

**The Information Sought from Respondent by the Select Committee Was Pertinent to the Inquiry into "Lobbying Activities" Authorized by the House of Representatives in Resolution 298**

The Court of Appeals held that the information sought from respondent by the House Select Committee on Lobbying Activities was not "pertinent" to the inquiry into "lobbying activities" authorized by the House of Representatives in Resolution 298, and that respondent was therefore free to refuse to give the information. The court was of the view that "lobbying," as used in the Resolution, involves only "representations made directly to the Congress, its members, or its committees" (R. 203-4) and does not cover "efforts to influence public opinion" (R. 205). The majority opinion indicates that this holding that the House did not authorize the type of demand made upon respondent is largely based on the broader assumption that the grant of such power would have been unconstitutional (R. 205). We deal with the problem of constitutionality in Points I (*supra*, pp. 22-26) and III (*infra*, pp. 57-80). Here, we shall show that—constitutional considerations aside—the information sought was clearly "pertinent", and that "lobbying," as used in Resolution 298, includes deliberate organized efforts to influence indirectly the course of legislation.

A. *The terms and immediate legislative history of Resolution 298.*

The House Resolution (No. 298) establishing the Select Committee authorized and directed it to "conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation" (R. 188).

On its face, this is a broad authorization, and would seem plainly to have made pertinent an inquiry into the major sources of support for a lobbyist registered, as was CCG, under the Federal Regulation of Lobbying Act (60 Stat. 812, 839, 2 U.S.C. 261-270, *infra*, pp. 82-89), particularly since that Act applies, in terms akin to those of Resolution 298, to all persons soliciting or receiving money to be used principally "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States" (Sec. 307 (b), 60 Stat. 841, 2 U.S.C. 266 (b), *infra*, pp. 85-86) (see R. 205). And the direction to study and investigate "all" lobbying activities "intended to influence, encourage, promote, or retard legislation" is certainly wide enough to encompass all organized efforts to influence public opinion in regard to federal legislation. An inquiry designed to be limited to the practice of "button-holding" Congressmen would not be phrased so broadly.

The House debate on Resolution 298 confirms



this reading. The chief sponsor (Mr. Sabath) mentioned CCG—which rarely, if ever, engaged in direct representations to Congress—as being a large “lobby organization” and indicated that one purpose of the inquiry would be to study the workings of the Regulation of Lobbying Act (95 Cong. Rec. 11386). Congressman Buchanan, who became chairman of the Select Committee, referred to “pressure groups” and the operations of the Lobbying Act as the objects of the inquiry (95 Cong. Rec. 11389). Congressman Holifield spoke of the “pressing” need to look into the “over-all effect on legislation in this Nation of the expenditure of millions and hundreds of millions of dollars to influence legislation” (95 Cong. Rec. 11389). That remark could be applied only to so-called “pressure groups” and “indirect lobbyists,” since “direct lobbyists” obviously do not expend such vast sums.

#### *B. Past Congressional studies of “lobbying”*

The propriety of this construction of Resolution 298 is further underlined by the history of past Congressional inquiries into “lobbying.” The problem of what, if anything, to do about attempts to influence indirectly the course of legislation has been before Congress for a long time. The recent Select Committee investigation was the fourth major Congressional inquiry into lobbying since 1913, and there have been other inquiries which have touched on the subject. Each of the earlier lobbying investigations arose out of some widely publicized effort to affect public opinion with re-

spect to some single issue. See Lane, *Some Lessons from Past Congressional Investigations of Lobbying*, 14 Pub. Op. Quar. 14 (1950). None resulted in legislation. But each studied and viewed as "lobbying" an organized attempt to influence or mould public opinion on a matter of Congressional legislation.

In 1913, the tariff lobby's activities in opposition to the administration's Underwood Tariff Bill provoked President Wilson's statement to the press to the effect that (Lane, *supra*, at p. 16):

Washington has seldom seen so numerous, so industrious, or so insidious a body. The newspapers are being filled with advertisements calculated to mislead the judgment not only of public men, but also the public opinion of the country itself. There is every evidence that money without limit is being spent to sustain this lobby *and to create an appearance of a pressure of public opinion antagonistic to some of the chief items of the tariff.* \* \* \* [Emphasis added.]

This statement, in turn, provoked investigations in both houses of Congress. Among other things, it was disclosed in these investigations that the Beet Sugar Grower's Association and the Wholesale Growers Association had each raised and spent over \$500,000 in their efforts to influence the content of the Underwood Tariff Bill. 1,525,000 pieces of literature, pro and con, has been mailed out under the frank of friendly members of Congress. In addition, in probing more broadly, the House

Committee charged that the National Association of Manufacturers had carried on a "disguised propaganda campaign" through newspapers, publicists, speakers, and literature in schools, colleges, and civic organizations throughout the country. H. Rep. 113, 63rd Cong., 2d sess., printed in 51 Cong. Rec. 565-584, 566-567, 574.

Although 12 bills calling for various kinds of Congressional regulation of lobbying were introduced in the Sixty-Third Congress (1913-1915), no legislation resulted. See Lane, *op. cit. supra*, pp. 16-20. Nonetheless, it is significant that the Sixty-Third Congress' House Committee defined lobbying as "The activity of a person or a body of persons seeking to influence Congress in any way whatsoever." See Hearings, House Select Committee on Lobbying Activities, 81st Cong., 2d sess., pt. 1, p. 7; see also 51 Cong. Rec. 569.

The pattern of activities studied as "lobbying" in the 1913 investigation reappeared in somewhat different aspect in the work in 1929-1931 of the Caraway Committee, a subcommittee of the Senate Judiciary Committee. See Hearings, Senate Lobbying Investigation, 71st Cong., 1st, 2d, and 3rd sessions; 72d Cong., 1st sess. The precipitant was, again, a tariff bill. The Committee's authorization was broad. The resolution referred to the specific incident which provoked investigation, and, also, to the activities of all other lobbying associations and lobbyists, their revenues and expenditures, and "the effort they put forth to affect legislation." Lane, *op. cit. supra*, p. 22. Although this commit-

tee did not submit a final report, several of its interim reports detailed the ways in which money was spent and the techniques which were said to be used by several groups in influencing legislation indirectly. Sen. Rep. 43, 71st Cong., 1st sess., pt. 4 (American Taxpayers' League), pt. 5 (sugar lobby), pt. 7 (Muscle Shoals lobby).

In 1935-1936, a third major investigation resulted from alleged efforts by the public utility companies to influence legislation regulating the public utility holding companies. The Black Committee was designated by the Senate to investigate "all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly" in connection with the Public Utility Holding Company Act (S. Res. 165 and 184, 74th Cong., 1st sess.). It made an intensive study of these efforts. It discovered a number of activities designed to create public opinion, or to give the impression that it was of certain character. It showed, for example, that out of a total of 31,580 telegrams sent to Washington from twenty different towns, all but 13 were filed and paid for by utility company agents, almost invariably without consent of the person whose name was used. Hearings, Special Senate Committee to Investigate Lobbying Activities, 74th Cong., 1st and 2d sessions and 75th Cong., 3rd sess., pp. 1014-1015. However, no legislation resulted. Lane, *supra*, pp. 25-29.

In 1938, the Civil Liberties Committee of the Senate Committee on Education and Labor described what it regarded as a large scale propa-

ganda campaign undertaken in the mid-thirties "in part to sway public opinion in favor of a legislative program" in the field of industrial relations. The Committee's report referred to "radio speeches, public meetings, news, cartoons, editorials, advertising, motion pictures" as "devices of molding public opinion [which] have been used without disclosure of [their] origin and financial support \* \* \*" (S. Rep. 6, pt. 6, 76th Cong., 1st Sess. pp. 218-219).

The Temporary National Economic Committee, established in 1938, published in 1941 its monograph No. 26, entitled, "Economic Power and Political Pressures" which dealt with the problem of lobbying and propaganda techniques and their relationships to economic power. It recommended, *inter alia*, disclosure of sources of funds and expenditures for public relations services, advertising, radio, etc. (p. 194).<sup>10</sup>

The Federal Lobbying Act of 1946 represents the first substantial attempt to deal concretely with the "lobbying" problem as its prior studies had revealed it to Congress.<sup>11</sup> As pointed out above (pp. 29-30), the Act is particularly significant in understanding the scope of the 1949 investigation because the Select Committee's task, in part, was to evaluate the operation of that Act. See also II.

<sup>10</sup> The Report of the President's Committee on Civil Rights (1947), pp. 52-53, recommended that the Government "provide a source of reference" for "accurate information" as to "those who are active in the market place of public opinion" (see *infra*, pp. 74-75).

<sup>11</sup> On the Lobbying Act, see Futer, *Analysis of Federal Lobbying Act*, (1949) 10 Fed. B. J. 366; Note (1947) 47 Col. J. Rev. 98; Comment, (1947) 56 Yale L.J. 304.



Rep. 3138, 81st Cong., 2d Sess., p. 3 (General Interim Report of the House Select Committee on Lobbying Activities). The significance of the Act in this connection is, in turn, enhanced because it was a part of the Legislative Reorganization Act of 1946 which represented a major attempt to improve the framework of the legislative process. Among the improvements resulting were reduction in the number of standing committees, increase in the number of experts on legislative matters available for independent advice to Congress, and expansion of the office of legislative counsel. See 60 Stat. 812-852. All of these measures, and they are not exhaustive, were based on the assumption that the legislative process could operate effectively, in view of the complexities of the problems before Congress, only if committee procedures were simplified and the process of obtaining information was made more reliable. In this context, the statement by the Joint Committee on the Organization of Congress (which proposed the Federal Lobbying Act), about the significance of lobby control, seems to us of first relevance as showing what Congress then included in the concept of "lobbying" (S. Rep. 1011, 79th Cong., 2d Sess., p. 26):

We fully recognize the right of any citizen to petition the Government for the redress of grievances or freely to express opinions to individual Members or to committees on legislation and on current political issues. However *mass means of communication and the art of public relations have so increased the pres-*

*asures upon Congress as to distort and confuse the normal expressions of public opinion.*

A pure and representative expression of public sentiment is welcome and helpful in considering legislation, but *professionally inspired efforts to put pressure upon Congress cannot be conducive to well considered legislation.* [Emphasis added.]

These earlier investigations and comments make it abundantly clear that Congress has for many years viewed the problem of "lobbying" as one of broad dimensions, extending to the deliberate and organized influencing of public opinion to support or reject legislation. Such a history makes it very improbable that the 1949 Congress would have intended that the words of House Resolution 298, establishing the present Select Committee, should be read so as to limit an investigation of "lobbying" to direct-contact activities. And they foreclose any assumption that, in the eyes of Congress, the scope of the lobby problem and legislation needed to solve it could be evaluated without information as to the organization and financing of plans to mould or create public opinion with respect to federal legislation.

### *C. The Select Committee's consideration of the problem of "lobbying"*

With this background of consistent Congressional definition of the lobby problem in broad terms, the present Select Committee undertook its investigation. Review of the conduct of its hearings underlines its understanding of its charge,

and, in addition, shows why the information sought from respondent was pertinent to the "question under inquiry."<sup>12</sup>

The Select Committee first called witnesses to testify on the subject of "The Role of Lobbying in Representative Self-Government." The Select Committee was told, as earlier committees had been told, that the buttonholing-of-Congressmen approach to lobbying was no longer its major aspect. The testimony was that dollarwise, at least, by far the greater part of efforts to influence legislation were indirect efforts to "make" public opinion which, in turn, was expected to produce the necessary demand or support for legislation.<sup>13</sup> Thus, it was said that "modern public relations counsel \* \* \* lay down a barrage of letters and telegrams on congressional offices, and use all the techniques of high-pressure publicity—press, radio, movies, advertising, pamphlets, books, magazines, exhibits—in an attempt to arouse legislative and public support for their programs."<sup>14</sup> Hearings.

<sup>12</sup> For a study of the Select Committee's inquiry, see Note: *Investigations in Operation:—House Select Committee on Lobbying Activities*, (1951), 18 U. of Chi. L. Rev. 647.

<sup>13</sup> Even the Committee for Constitutional Government took the view that "the place to persuade Congressmen is back home." See H. Rep. 3138 (General Interim Report of the Select Committee), 81st Cong., 2d Sess., p. 31.

<sup>14</sup> The Committee, in its General Interim Report, refers to the fact that Representative Clarence Brown had declared that he could always "smell" a pressure-inspired letter, H. Rep. 3138, 81st Cong., 2d Sess., pp. 23-24, and, in reply, calls attention to a circular sent by a national organization to realtors throughout the nation giving several suggested alternate "personal" paragraphs for use in letters to Congressmen. See the General Interim Report, *supra*, pp. 37-40.

2 Select Committee on Lobbying Activities, 81st Cong., 2d sess., *supra*, pt. 1, p. 99.

A series of witnesses outlined for the Committee some of the reasons why, in their view, these efforts of lobby groups posed a problem for those who wished to assure that the legislative process remained responsive to community needs. The Select Committee was told that the processes of formation of "public opinion" made that opinion at least with respect to certain issues, peculiarly susceptible and responsive to certain kinds of organized pressures. It was told, for example, that community responses of sufficient strength to have an impact on legislators tended to be group responses to proposed situations or measures which the group supposed would affect its interests in some substantial way. Some of these measures were so directly related to particular group interests that simply an awareness of the barest fact determined the group position. But when the group interest with respect to a particular legislative measure was less clearly defined, the witnesses thought that it became possible for astute organizers to develop group support for the measure, by associating the symbols of deeply felt group aims with the success of the particular measure, or by careful selection of facts relevant to the issue and the group interest. See Hearings, Select Committee, *supra*, pt. 1, pp. 15, 27-28; H. Rep. 3138, 81st Cong., 2d sess., p. 29, § 5, cf. Hartley, *The Social*

*Psychology of Opinion Formation*, 14 *Pub. Op. Quar.* 668; Fisher, *Public Opinion as a Process in Society*, 14 *Pub. Op. Quar.* 674.

The Committee was also told of various facts which, in the opinion of the witnesses, justified the suspicion that the process of opinion-moulding was producing the desired results. The Committee was told, for example, of a study of the relationship between opinion as expressed in Congressional mail in 1940 about the Burke-Wadsworth Selective Service Act and opinion as disclosed by privately conducted surveys. 13,000 letters obtained from five senators showed 90 percent of the writers to be against the bill. At the same time, a private survey showed that 70 percent of the public was for it. Hearings, Select Committee, *supra*, pt. 1, p. 20.

Again, witnesses contrasted what "leaders" of pressure groups represented was the ~~view~~ of their groups, and what impartial surveys showed their views to be. For instance, at a time when leaders of farm organizations were proclaiming the "farm opinion" on subsidies, a farm survey showed that only 14 percent of a cross section of farmers could give a correct definition of a farm subsidy and fully half had not the vaguest idea what such a subsidy was. Hearings, Select Committee, *supra*, pt. 1, p. 23.<sup>15</sup> It was suggested to the Select Committee

<sup>15</sup> George B. Galloway, Senior Specialist in American Government for the Legislative Reference Service, Library of Congress, and who had been staff director on the Joint Committee on Reorganization of Congress, also testified, Hearings, Select



that lobbying organizations should provide data with respect to the methods of determining policy within the organization. Hearings, House Select Committee, pt. 1, *supra*, p. 116.

It was also suggested that the volume of money being spent on efforts to influence opinion raised questions about the effect of such efforts on the integrity of the legislative process. Cf. Hearings, Select Committee, *supra*, pt. 1, p. 121. The Select Committee noted that, except for organizations which have a large base of individuals for their support, most of the important groups seeking to influence public opinion are dependent on the support of large contributors. Its General Interim Report presented the following data with respect to the bank deposits of CCG and two of its subsidiary groups, which was alleged to be typical of such organizations and applicable not only to conservative groups but also to so politically divergent a group as the Civil Rights Congress (see H. Rep. 3138, 81st Cong., 2d Sess., p. 15):

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Committee, *supra*, pp. 97, 99, that: " \* \* \* the stand taken on matters of public policy by the spokesmen for organized pressure groups may not represent the majority opinion of their own groups or reflect the views of the American people. Some organized groups in American life have become so large that their leaders cannot keep in close touch with the membership. Consequently the leaders may sometimes, in the name of the group, press for legislation which serves their own personal interest or predilections. Public opinion polls in recent years have sometimes shown a marked divergence between the attitudes of the official spokesmen of organized groups and the opinion of the rank and file."

Group	Period	Total Deposits	Amount of checks of \$500 or more	Percentage of total deposits	Number of checks of \$500 or more	Average size of checks of \$500 or more
America's Future Inc.	1947-50	\$1,054,721.65	\$560,883.49	53.1	423	\$1,326
Constitution and Free Enterprise Foundation, Inc.	1947-50	139,239.17	85,095.00	61.1	71	1,199
Committee for Constitutional Government <sup>16</sup>	1947-50	1,285,125.82	508,343.04	39.6	383	1,320

On the other hand, it was strongly urged, as a separate and positive aspect of the problem, that the lobbies were a natural growth in response to the need for affording representation of real public interests in a legislature compelled to operate on a geographically representative basis. Particularly were such organizations said to be useful in furnishing factual information on matters of special interest to the groups they represented. Hearings, Select Committee, *supra*, pt. 1, pp. 41, 58.<sup>17</sup>

<sup>16</sup> Includes only one of its accounts.

<sup>17</sup> In its General Interim Report (H. Rep. 3138, 81st Cong., 2d Sess., p. 27), the Committee stated: "The service function of lobbying takes on many different forms. When representatives of organized groups appear before committees of Congress, for example, they are not only presenting their own case but they are also providing Members of Congress with one of the essential raw materials of legislative action. By the same token, the drafting of bills and amendments to bills, the preparation of speeches and other materials for Members, the submission to Members of detailed memoranda on bill-handling tactics—all of these are means by which lobby groups service the legislative process and at the same time further their own ends."

All of these factors, the relevance of which was suggested by witnesses to the Select Committee, were thought by the Committee to be within the scope of the investigation which had been delegated to it. The Select Committee indicated this, in saying, in its General Interim Report, that (H. Rep. No. 3138, 81st Cong., 2d Sess., pp. 3-4):

The committee felt that its final and perhaps most important responsibility was to analyze in an objective and meaningful way the relation of large-scale lobbying in all of its ramifications to the long-run maintenance of our treasured representative system of government. In our view, this is the ultimate problem which large-scale lobbying raises. \* \* \*

[One] of the central purposes of government is that people should be able to come to it; in our system, lobbying has been a principal means by which this could be done. But at the same time it is important to ask whether our kind of popular government can indefinitely absorb the impact of an inherently expansive system of organized pressure; whether we can continue to absorb the social cleavages, the clusters of private power of which this mounting pressure is both cause and symptom. This is no abstruse problem in political theory. The way in which these questions are resolved is the key to our institutional future.

In sum, witnesses called in the general phase of its hearings told the Select Committee, first, that the processes of opinion formation could be abused; second, that the processes of determining public

opinion with respect to legislative issues, and particularly as that opinion was brought to the attention of Congress, were in fact being abused, although it was difficult to measure the extent of abuse; and, third, that there was a growing feeling that lobbies had become an integral part of the information-furnishing part of the legislative process and that, properly regularized, they could do that job effectively.<sup>18</sup>

After this general survey, the Select Committee then undertook a detailed study of particular organizations, drawn on the basis of preliminary staff studies, representing variant political outlooks and different professional approaches to the problem of influencing opinion. The Committee made a study of the so-called "housing lobby": of the National Association of Real Estate Boards and of various organizations which participated in its efforts. It studied the National Economic Council, the Committee for Constitutional Government, the Americans for Democratic Action, the Public Affairs Institute, the Foundation for Economic Education, and the Civil Rights Congress. It investigated what were thought to be the legislative activities of certain executive agencies: the Housing and Home Finance Agency, the Department of Agriculture, the Federal Security

<sup>18</sup> An eloquent statement of the value of lobbyists, of some of the factors underlying the lobby problem, and reasons why disclosure is valuable, appears in the Report of the California legislature's joint Committee Investigating Lobbying Activities, Hearings, Select Committee, *supra*, 81st Cong., 2d Sess., pt. 1, pp. 81-84.

Administration, and the Department of State, and of the supervisory functions, with respect to these agencies, of the Bureau of the Budget and the General Accounting Office. With respect to the efforts of these various bodies to affect legislative action, the Select Committee considered the extent of their activities in influencing opinion, directly and indirectly, the techniques employed, the devices used by the private agencies for raising funds, and in some detail it considered aspects of contingent fee lobbying.<sup>19</sup>

It is plain from this review that the Select Committee, from the beginning of its investigation, understood "lobbying activities" to include organized efforts of bodies such as the Committee for Constitutional Government to influence public opinion in regard to federal legislation by speeches, books, articles, other publications, etc.<sup>20</sup> From the

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<sup>19</sup> The Select Committee outlined its efforts as follows (H. Rep. 3138, 81st Cong., 2d Sess., p. 3):

"We have directed canvass along four principal lines:

1. The number, identity, and interrelationships of those groups and persons actively attempting to influence legislation.
2. The amounts and kinds of expenditures made by these groups and persons in attempting to influence legislation.
3. The ways in which funds expended for these purposes are solicited, and the sources of these funds.
4. The technique of influencing legislation, directly and indirectly."

<sup>20</sup> The minority members of the Select Committee apparently did not agree with the majority as to this definition of "lobbying activities", but it is not clear that the minority would construe that term, as used in Resolution 298, as narrowly, as the court below. See Minority Views, H. Rep. 3239, Part 2, 81st Cong., 2d Sess., January 3, 1951, pp. 1-3.



Select Committee's point of view, it was indisputably entitled to discover CCG's methods of operations and the sources of its financial support.

*D. The pertinence of the particular information sought from respondent*

Each of the different aids to interpretation of Resolution 298 discussed in the preceding three subdivisions of this Point (*supra*, pp. 29-45) leads to the same conclusion:—That Congress authorized the Select Committee (and the Committee undertook) to inquire into the efforts of organized groups to influence public opinion with respect to Congressional action and, in that connection, to look into the working of the Regulation of Lobbying Act. On that view of the "question under inquiry" by the Select Committee, there is no doubt that the information demanded from respondent was "pertinent"—on any theory of the materials properly to be considered in determining that issue.

1. In the courts below, the Government's main ground for contending that pertinency had been shown was the fact that respondent and CCG had registered under the Regulation of Lobbying Act. Even on that limited basis, pertinency seems clear. The Select Committee was to inquire into the operation of the Lobbying Act and the need for its amendment. That Act, as it now stands, covers the receipt or solicitation of money to be used principally to aid in the influencing, directly or indirectly, of the passage or defeat of any legislation

by Congress (Sec. 307 (b), 2 U.S.C. 266 (b), *supra* p. 29). Since both respondent and CCG were registered under the Act, the Select Committee was entitled to inquire about the sources of their financial support in order to see whether they had received or solicited undisclosed money for the purposes stated in the Act, and whether the monies paid for books and pamphlets were in reality contributions for the statutory purposes. Since the Act requires all "contributions" of \$500 or more to be reported (*infra*, pp. 84-85), the Committee could properly inquire whether purchasers of \$500 or more of CCG's publications were, in reality, contributors whose names CCG should have filed under the Act. This inquiry the Committee could reasonably think would only be accomplished by obtaining the names of the alleged purchasers, from whom further information might be obtained. The names would also reveal the total amounts paid by the same or related persons to CCG in one year. Further, the Select Committee was entitled to obtain this information in order to decide whether the Lobbying Act should be amended to require fuller and more detailed disclosures from organizations like CCG, or whether, on the other hand, such groups should be expressly exempted. Compare *Sinclair v. United States*, 279 U. S. 263, 297-298.

It would make no difference to the Select Committee's right to pursue these inquiries that the registrations were made under protest (see *e.g.*, R. 182). Respondent and CCG were, at the least,

arguably within the Lobbying Act's provisions, or they would not have registered. The Select Committee could certainly accept the registrations as proof that CCG's activities were within the general field with which the Lobbying Act is concerned, even though CCG might be held in a judicial proceeding not to be covered by the statute as now written.<sup>21</sup>

2. Respondent's and CCG's admitted registration under the Regulation of Lobbying Act would be enough, standing by itself, but the pertinency of the information demanded from respondent may also be sustained on the basis of the detailed information concerning CCG already before the Select Committee when respondent was called before it, and incorporated in the record of its hearings (Hearings before the House Select Committee on Lobbying Activities, 81st Cong., 2d Sess. (1950)) and in its Report Citing Edward A. Rumely, H. Rep. 3024, 81st Cong., 2d Sess., transmitted by the Speaker. *Supra*, pp. 5-9. Judge Bazelon grounded his dissent partially on this material (R. 210-211, 218-223), but the majority of the Court of Appeals held that the only materials which could be considered were those formally introduced into

<sup>21</sup> For the reasons given, *infra*, pp. 57 *et seq.*, it is also immaterial whether the Lobbying Act, as applied to CCG, would be constitutional or whether particular amendments to the Act would be valid.

In this Point, as already noted (p. 28), we discuss the question of pertinency as if no constitutional issues had been raised and the answer depended solely on the scope of the authority Congress intended to give to the Select Committee.

evidence in the District Court (R. 209). In our view, these documents can be considered on the legal issue of pertinency.

a. Speaker Rayburn's certification of the Select Committee's Report Citing Edward A. Rumely, *supra*, was offered and admitted into evidence (R. 19, Gov. Ex. 4). The Report was physically attached to the certification, but was apparently not itself technically introduced into evidence (R. 19). However, it was actually before the trial judge and formed the official Congressional "statement of fact" of the witness' default, under R. S. 104, 2 U. S. C. 194, as well as being the Select Committee's own formal declaration on the subject of pertinency. There is nothing to show that it was not considered by the trial judge, and the opinion below shows affirmatively that its contents were weighed, though rejected, by the Court of Appeals (R. 199-200).

Similarly, the two printed volumes of the Select Committee's hearings dealing with CCG were actually before the trial judge and were referred to during the testimony of counsel for the Select Committee (see R. 21, 23-30, 32-35), as well as during respondent's testimony (R. 104-116). In his argument to the court on pertinency, respondent's counsel specifically referred to portions of the hearings which had not been formally put in evidence (see R. 61, 69, 90-91). For all practical purposes the hearings appear to have been before the court in exactly the same sense as if they had been intro-



duced. That technical lapse, if it be one,<sup>22</sup> should not stand in the way, for the issue of pertinency is one of law, solely for the judge, and does "not depend upon the probative value of evidence." *Sinclair v. United States*, 279 U. S. 263, 298. And, here too, there is nothing to show that the trial court did not consider the hearings in passing upon pertinency, though it is clear that the Court of Appeals refused to do so (R. 209).

But we also submit that the Contempt Report and the data in the hearings (summarized in the Select Committee's general reports) may be considered by this Court even if the District Court did not do so. The Court can, of course, take judicial notice of committee hearings and reports, without proof. Cf. *United States v. Aluminum Company of America*, 148 F. 2d 416, 445 (C. A. 2).<sup>23</sup> Since the issue of pertinency was for the judge alone, there is no problem as to facts not being before the jury. The Government is thus not precluded from sustaining a conviction on appeal on a legal basis not advanced on trial, so long as the defendant is not thereby prejudiced. *Wagner v. United States*, 67 F. 2d 656 (C.A. 9); see *Kawakita v. United States*, 343 U. S. 717, 731-732.

<sup>22</sup> Coupling the repeated references to the hearings with the colloquy of counsel reprinted *supra*, fn. 2, p. 4, one could conclude that the hearings were actually accepted in evidence and treated as such, although no formal notation to that effect was made.

<sup>23</sup> It is noteworthy that, in *McGrain v. Daugherty*, 273 U. S. 135, 179-180, the Court referred to proceedings in the Senate which had not been introduced into evidence or included in the record (No. 28, October Term, 1926).



*Securities and Exch. Comm. v. Chelery Corp.*, 318 U. S. 80, 88; *United States v. Holt Bank*, 270 U. S. 49, 55-56; Rule 52(a), F. R. Crim. P. No prejudice can be claimed. As the District Court has already sustained the probe under less fully developed circumstances (on respondent's theory of what was before the judge), there is no reason to suppose that it would have reached a different conclusion if a fuller showing had been made.

b. The burden of a large portion of the Report Citing Edward A. Rumely, (*supra*, pp. 6-9) was that the evidence before the Select Committee indicated that CCG and the respondent may well have devised in recent years a means of circumventing the Lobbying Act—which requires reports of contributions of \$500 or over—by insisting that contributions of more than \$490 must be in the form of the “purchase” of books and pamphlets.<sup>24</sup> The Select Committee expressly reported that respondent's refusal to produce the names of these so-called “purchasers” prevented it from determining whether the Lobbying Act had been evaded or whether it needed amendment to prevent circumvention. See *supra*, pp. 8-9.

This was clearly the most precise and particularized showing of pertinence that could be demanded from a Congressional Committee. The only non-constitutional reason given by the Court

<sup>24</sup> For instance, Chairman Buchanan, in a colloquy reproduced in the Contempt Report, pointed out that respondent had reported only about \$25,000 in loans and contributions although it appeared that CCG would expend over a million dollars that particular year. H. Rep. 3024, p. 16; see R. 221.

of Appeals for rejecting this showing was that subterfuges or circumventions could be shown only if *all* financial records were considered together, and respondent was not permitted to show to the trial court the substantial data as to CCG's finances which he had furnished to the Select Committee (omitting names and addresses of purchasers) (R. 200). But the Select Committee was of the opposite opinion. It felt that financial data, without more, were insufficient, that it had to know the names of the "purchasers" in order to discover whether these "purchasers" were really contributors and, if so, whether they were splitting their contributions among themselves, their relatives, and associates; on that problem the other financial data would be of no help whatever.<sup>25</sup>

The Select Committee's view of its need for the names seems quite correct (see the dissenting opinion below, R. 210-212) and should have been adopted. At any rate, its opinion was extremely reasonable and should, therefore, not have been rejected. Where a Congressional Committee makes a reasonable showing of need for information, a court should not decide for itself that—though the Committee has, so to speak, shown "probable cause"—nothing will really be learned

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<sup>25</sup> The Court of Appeals appeared to believe (R. 200) that, if subterfuges had been practiced, they would necessarily reveal themselves in falsifications of the financial data furnished by respondent. This seems to us to miss the point of the Select Committee's demand for the names. It was precisely because subterfuges (as described above, pp. 6, 8-9, 50-51) could co-exist with complete technical "accuracy" in the financial records kept by CCG that the Committee desired to probe further.

in the end. Cf. *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 216-217; *Blair v. United States*, 250 U. S. 273, 282; *Townsend v. United States*, 95 F. 2d 352, 361 (C.A. D.C.), certiorari denied, 303 U. S. 664.

c. The proceedings of the Select Committee, as revealed in its hearings and its general reports (aside from the Contempt Report), also clearly showed that CCG's activities were of a type directly pertinent to the Committee's work and that the information sought from respondent was relevant.<sup>26</sup>

The Select Committee knew, for example, that CCG had spent over \$2,000,000 since 1946.<sup>27</sup> It had been informed that the principal activities of CCG appeared to be raising money, stimulating letter and telegram campaigns on pending legislation, and distributing books, pamphlets and other printed matter to Members of Congress, State legislators, other public officials, and selected private institutions, organizations, and individual citizens. H. Rep. 3024, 81st Cong., 2d Sess., pp. 1-2.

<sup>26</sup> The question is not at all whether the facts which the Select Committee had learned about respondent and CCG are true. The question is whether the circumstance that they had been called to the attention of the Select Committee makes legitimate the Committee's concern, within the scope of its investigation, with the further information which respondent refused to furnish.

<sup>27</sup> Indeed, the fact that CCG expended large sums in influencing public opinion, and would therefore be studied, was called to the attention of the whole Congress before the Select Committee was even authorized to begin its work. See 95 Cong. Rec. 11386, *supra*, pp. 29-30.

The Select Committee knew, more particularly, that in 1944 CCG published and distributed a booklet entitled "Needed Now—Capacity for Leadership, Courage to Lead," in which CCG deprecated the value of older lobbying techniques under which delegations "buttonhole legislators" as "stunts which attract some popular attention but persuade no Congressmen." Rather, CCG urged: "The place to persuade Congressmen is back home." The Select Committee knew that, between 1937 and 1944, CCG sent out:

Eighty-two million pieces of literature—booklets, pamphlets, reprints of editorials and articles, specially addressed letters and 760,000 books.

More than 10,000 transcriptions carrying 15-minute radio talks on national issues, besides frequent national hook-ups for representatives of the committee.

Three hundred and fifty thousand telegrams to citizens to arouse them to action on great issues.

Many thousands of releases to daily and weekly newspapers—full page advertisements in 536 different newspapers with a combined circulation of nearly 20,000,000.

Quoted from *Needed Now—Capacity for Leadership, Courage to Lead* (New York, 1944), pp. 30-31 in H. Rep. 3138, 81st Cong., 2d Sess., p. 31.

The Select Committee knew that CCG's activities had expanded greatly since 1944. It knew, from respondent's testimony, that CCG had distrib-



uted close to 700,000 copies of *The Road Ahead* by John T. Flynn since its publication in 1949; and it was informed that this book, although in part of a general nature, included "sharply critical analyses of the proposed Columbia Valley Authority, of national health insurance, the Spence bill, the Brannan plan".<sup>28</sup> The Select Committee knew further that CCG had distributed widely a number of publications which included *Why The Taft-Hartley Act?*, *Labor Monopolies or Freedom*, and a book by Melchior Palyi, *Compulsory Medical Care and the Welfare State*. The Select Committee states that:

The reader of these and other Committee for Constitutional Government materials is exhorted again and again to write his Congressman, to send a copy of the book or pamphlet to the Congressman, and to distribute the material as widely as possible. The reader is not only urged to accept a point of view, but to act as well.

The Select Committee also believed that CCG had "set its sights on the distribution of 2½ mil-

<sup>28</sup> The Select Committee's General Interim Report (H. Rep. 3138, 81st Cong., 2d Sess., p. 32) quoted from p. 140 of *The Road Ahead* some comments on the Spence bill and the Brannan plan. The Select Committee then notes that the Spence bill is specifically identified in the book as H. R. 2756 introduced February 15, 1949, and that the Brannan plan is similarly identified as being "embodied in Senate bills 1971 and 1882." It is further noted that, in a special appendix to CCG's edition of *The Road Ahead*, the following appears:

"In our opinion, sane farm leaders and business leaders especially had better bestir themselves. If they let the Brannan plan campaign go by default, they and all of us will rue the day."



lion copies of *The Road Ahead*, to what [CCG] calls the 'opinion-molding leadership individuals of the Nation who build the greatest influence and who will buy in large quantities and distribute in their respective circle.' " And the Select Committee thought this to be an accurate reflection of the general approach of all mass-pamphleteering groups, i.e., stimulation of grass roots pressure, with concentration on the strongest roots. H. Rep. 3138, 81st Cong., 2d Sess., p. 36.

Moreover, the data on the nature of CCG's program took on additional significance when considered in connection with the Select Committee's information that CCG had, after the enactment of the Lobbying Act, adopted a new practice of accepting payments of over \$490 only if the remitter specified that the funds be used for the distribution of one or more of CCG's books or pamphlets. See pp. 6, 8-9, 50, *supra*.<sup>29</sup> These facts suggested to the Committee that the purchases were, in substance, "contributions". Certainly, they were not the same as purchases of books and pamphlets from a publisher who has no such special and regularized interest in the political content of his publications as it appears that CCG had. Therefore, as we have already noted, both the comment of the

<sup>29</sup> Rumely testified at the hearings that this policy went into effect when the Lobbying Act was passed. Hearings, *supra*, pt. 5, p. 37. He also testified that this was done because "we didn't want to get into the position of reporting our contributors." Hearings, pt. 5, p. 29; see, also, pp. 37, 42.

See also the correspondence with Eli Lilly & Co., reproduced in the dissenting opinion below (R. 219-221).

Select Committee's Report citing respondent for contempt, see pp. 8-9, *supra*, and that of the dissenting opinion below (R. 210-I, 222-3), properly emphasize that, in view of the requirements of the 1946 Act, the information sought from respondent was pertinent because of the light it might shed on a possible evasion, in letter or spirit, of the disclosure requirements of the Act; and, as well, the possible need for further legislation.

In this connection, the Select Committee had even more precise reason to probe further. It was disturbed by a discrepancy between respondent's testimony that, in 1949, CCG "had 22,000 orders for books, averaging \$15 each—80 percent for 1 to 10 copies, a small number for larger quantities" (Hearings, *supra*, pt. 5, p. 49), on the one hand, and a report by the Eli Lilly Co., on the other, that that company had "contributed" \$25,000 to CCG in 1949. As CCG had indicated that a "contribution" of \$25,000 would have been reported by CCG, and no such contribution was reported, the Select Committee suspected that the sum must have been used for publications of CCG. And yet, this cast some doubt on respondent's statement as to the number of books sold and the volume in which they were sold. The refusal to disclose the names of purchasers obviously made almost impossible any attempt to get a complete picture of CCG's activities and financial support. See H. Rep. 3138 (General Interim Report), 81st Cong., 2d Sess., pp. 12-13. Even if the Eli Lilly "contributions" were for publications other than books, the fact remains that

the discrepancy between Lilly's "contribution" and Rumely's "purchase" was a matter with which the Select Committee could properly be concerned.

If, as we have shown (*supra*, pp. 29-45), the Select Committee was empowered to investigate (a) the efforts of organized groups to influence public opinion with respect to federal legislation, and (b) the working of the Regulation of Lobbying Act, there can be no question but that this collection of data on CCG's opinion-influencing activities and efforts to avoid full disclosure under the Act warranted the Committee's demand for the information which respondent refused. The names and addresses of the "purchasers" who paid \$500 or more were clearly pertinent to both aspects of the inquiry.

### III

#### **The House of Representatives Could Validly Authorize the Select Committee to Compel Disclosure of the Information Sought from Respondent**

The foundation stone of the majority opinion below is that Congress is without constitutional power even to inquire into organized efforts to influence public opinion for or against legislation. We have pointed out (*supra*, p. 28) that the opinion shows that the narrower holding—that the House of Representatives did not authorize that inquiry—is based on the assumption that authorization would have been unconstitutional. As we have shown in Point II (*supra*, pp. 28-57), however, such a narrow construction of the authorization given in Resolution 298 is wholly

impossible. Therefore, we must face squarely the problem whether the Constitution prohibits such inquiry.

The Court of Appeals' view appears to be that the Select Committee's demands on respondent were not in aid of the legislative function because the First Amendment and the representative nature of our government prevent Congress from adopting legislation regulating, in any way, the operations of organized groups such as CCG which seek to influence public opinion with respect to federal legislation (R. 200, 201-3, 205-6, 208-9). The court also apparently viewed the demands made on respondent as in themselves a violation of the First Amendment, and an abridgment of the rights of free speech and press (R. 200, 202-203, 206). Neither of these related holdings can be accepted. The Select Committee's inquiry was within Congress' general competence, and the First Amendment interposes no automatic bar either to legislation or to inquiry.

#### *A. The inquiry was within the competence of Congress*

1. *Legislative function of Congress:* In Point I (*supra*, pp. 22-26), we have set down the now incontestable principles that (a) Congress may compel testimony in aid of its legislative function, (b) the power of inquiry is generally more extensive than the substantive power to legislate, and (c) matters otherwise personal and private lose that character when they are pertinent to an in-



quiry in aid of legislation. Applied to this case, these settled rules clearly authorized the demands made by the Select Committee, for there can be no doubt, the First Amendment aside, that Congress has jurisdiction to legislate in this field. In that connection, it is quite unnecessary to consider the full extent to which Congress may validly legislate, or whether it should legislate, in relation to organized efforts to influence public opinion on federal legislative matters, for the court below was clearly in error in assuming that no valid legislation could possibly stem from the phase of the Committee's inquiry which was concerned with CCG and respondent.

Disclosure legislation is, of course, the means of "regulation" uppermost in the thinking of many who have considered these matters. As the dissenting opinion points out (R. 223-4), the principle of disclosure is one embodied in our law in many forms, and one which has been consistently upheld. *E.g.*, the disclosure provisions of the Federal Corrupt Practices Act (now 2 U.S.C. 241-256) were upheld in *Burrighs and Cannon v. United States*, 290 U.S. 534, 545; the conditioning of second class mailing privileges on disclosure of ownership and the marking of advertisements as

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<sup>30</sup> Respondent has not contended [as did Daugherty (*McGrain v. Daugherty*, 273 U.S. 135), Sinclair (*Sinclair v. United States*, 279 U.S. 263), and Eisler (*Eisler v. United States*, certiorari dismissed, 338 U.S. 883)], and the court below did not hold, that the Select Committee had no legislative purpose. As a matter of fact, it did recommend certain legislation, and report that it had considered other proposals. See fn. 34, *infra*, p. 63.



such was upheld in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288; *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 72-77; sustained a state statute compelling disclosure of the membership and constitution of the Ku Klux Klan. It has been broadly held that an administrative agency may be empowered to receive and publicize information within the sphere of its activities. See *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U.S. 419, in which the Court observed, in relation to the registration provisions of the Public Utility Holding Company Act, that "the requirement of information is in itself a permissible and useful type of regulation" (p. 439).

The same method of protecting the public interest by requiring the disclosure of factual information in fields subject to the power of Congress has been employed in a number of other federal statutes. Cf. Securities Act of 1933, 48 Stat. 74, 15 U.S.C. 77a; Food, Drug and Cosmetic Act, 52 Stat. 1040, 1041, 21 U.S.C. 321; Alien Registration Act, 54 Stat. 673, 8 U.S.C. 452; Regulation of Lobbying Act, 60 Stat. 839, 2 U.S.C. 261; Foreign Agents Registration Act, 52 Stat. 631, 22 U.S.C. 611; Act of October 17, 1940, requiring registration of certain subversive organizations, 54 Stat. 1201, 18 U.S.C. (1946 ed. 14-17, now 18 U.S.C. 2386); Internal Security Act of 1950, 64 Stat. 987, 993-996; 18 U.S.C. 612, 62 Stat. 719, 724, barring anonymous advertisements, etc., relating to candidates for federal office (R. 223).

Over twenty states seek to regulate some aspects of lobbying through disclosure (see Note, (1947) 47 Col. L. Rev. 98, 99-103; Comment (1947) 56 Yale L. J. 304, 313-316). Almost all the states require disclosure of campaign contributions and some also regulate political advertisements and circulars. (Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, (1948) 47 Mich. L. Rev. 181, 204-206).

Congress might well seek to adapt some variant of these statutory disclosure provisions to the present problem. It might clarify or expand the coverage by the Regulation of Lobbying Act of organizations like CCG which receive money for the purpose of influencing federal legislation.<sup>31</sup> Or it might regulate or prohibit anonymous distribution of publications relating to federal policy or legislation. It is possible that corporations (or other entities) spending corporate funds for such purposes could be required to report that fact to their stockholders or to Congress. Mass distributors of political books and publications (not in the publishing or

<sup>31</sup> The United States District Court for the District of Columbia recently held certain sections of the Lobbying Act unconstitutional for indefiniteness (*National Association of Manufacturers v. McGrath*, 103 F. Supp. 510, dismissed as moot by this Court, No. 174, October 13, 1952). This holding obviously does not negate congressional power to legislate with respect to indirect lobbying. See fn. 40, *infra*, p. 70. The fact that the particular Act was held deficient (and we do not concede that it is deficient) does not mean that Congress cannot enact a valid statute on the same subject, nor did the District Court so hold. Indeed, the case might be cited to illustrate the need for continued congressional inquiry as a basis for drafting a more definite law. Cf. *United States v. Slaughter*, 89 F. Supp. 205 (D.D.C.).

book business), as some of CCG's purchasers appear to be, might be required to report that activity.

We need not undertake to support the wisdom, necessity, or advisability of such legislation, nor even its constitutionality as applied to all situations.<sup>32</sup> Nor is it material that the Select Committee might possibly recommend, and Congress adopt, invalid legislation. Compare *United States v. Josephson*, 165 F. 2d 82 (C.A. 2), certiorari denied, 333 U. S. 838; *Barsky v. United States*, 167 F. 2d 241 (C.A.D.C.), certiorari denied, 334 U. S. 843.<sup>33</sup>

Unless it could be said, flatly and *a priori*, that Congress is wholly foreclosed by the Constitution from using this statutory device of disclosure with re-

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<sup>32</sup> See the objections in II Chafee, *Government and Mass Communications* (1947), 494.

<sup>33</sup> The Court of Appeals for the Second Circuit said in *Josephson*, *supra*, at pp. 90-91:

"\* \* \* in substance [the contention is] that the Committee's power to investigate is limited by Congress' power to legislate; Congress is prohibited from legislating upon matters of thought, speech, or opinion; ergo, a statute empowering a Congressional committee to investigate such matters is unconstitutional. The mere statement of this syllogism is sufficient to refute it. Congress obviously can use information gathered by this Committee to pass legislation not encroaching upon civil liberties, as above noted. The appellant's argument necessarily, therefore, is reduced to the absurd proposition that because the facts resulting from the Committee's investigations conceivably may also be utilized as the basis for legislation impairing freedom of expression, the statute authorizing such investigations must be held void."

The Court of Appeals for the District of Columbia Circuit said in *Barsky*, *supra*, at p. 245 that: "preliminary inquiry has from the earliest times been considered an essential of the legislative process. \* \* \* Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry."

spect to the financing, or supporters, or participants, or customers, or opinion-forming techniques, of organizations like CCG which admittedly seek to influence Congressional action—so that there would be no point even to Congress' collecting the facts or considering the problem—the inquiries directed to respondent would have to be deemed in aid of Congress' legislative function.<sup>34</sup>

It seems plain to us that this unequivocal rejection of all power cannot be supported. It is not denied that, apart from the First Amendment, Congress would have substantive authority to legislate on these matters, under its power to control its own activities, under the commerce power, and under the postal power. The only ground which has been advanced in this case for flatly denying all Congressional authority in this area is the First Amendment. Since that claim bears on all phases of the constitutional argument, we defer our detailed answer (*infra*, pp. 61-78) until we have discussed two other sources of Congressional jurisdiction.<sup>35</sup>

2. *Power of Congress over its own operations:*  
In Point I (*supra*, pp. 24-25), we indicated that, in

<sup>34</sup> The Select Committee, in its final Report and Recommendations on the Federal Lobbying Act (H. Rep. 3239, 81st Cong., 2d Sess., January 1, 1951), did recommend certain amendments to the Lobbying Act (pp. 29-31), and listed other amendments which were considered and rejected (pp. 31-2), including a proposal to exempt all groups and organizations.

<sup>35</sup> It might possibly be contended that a "right of privacy" protected by the Due Process Clause of the Fifth Amendment would, quite apart from the First Amendment, forbid any disclosure legislation. We discuss this argument briefly in Point III; C, *infra*, pp. 78-80.



addition to inquiries aiding it to legislate on a particular subject, Congress has power to inquire into its own operations and the influences affecting it. We believe this to be a separate basis for the inquiry under test, a basis which would support it even though (as is not the case) there were no aim to consider legislation. The fact is that for two generations Congress has been seeking to find out the facts about so-called "interest" or "pressure" groups, in their relation to the work of Congress, so that it can properly evaluate the facts and information they bring forth, as well as the public opinion they claim to represent. *Supra*, pp. 30-45. As we show in detail below (*infra*, pp. 70-75), there can be no doubt that this end is a legitimate one for Congress, and that the problem cannot be dismissed as unreal. For Congress, then, to inform itself on these general influences, through the mechanism of a committee inquiry, seems as clearly its right as the undisputed power to probe corrupt influences on individual members.<sup>36</sup>

3. *Congressional authority to bring information to public attention*: It may also be that Congress has general authority to investigate for the sole purpose of bringing information to public attention. There is considerable support, among students of Congressional power, for the view that the "informing function" of Congress in itself would have brought this investigation within its

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<sup>36</sup> Here, too, it will undoubtedly be said that the First Amendment forbids Congress to take action. See *infra*, pp. 66-78.



constitutional competence.<sup>37</sup> Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. R. 691, 811; Galloway, *Investigative Function of Congress*, 21 Am. Pol. Sc. Rev. 47, 62; Cousens, *Investigations Under Legislative Authority*, 26 Georgetown L.J. 905, 918; McGeary, *The Developments of Congressional Investigative Power*, p. 104. Woodrow Wilson expressed the opinion that

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.<sup>38</sup>

<sup>37</sup> It has been suggested that the function of informing the public is implied and inherent in the legislative purpose. *Landis, supra*, 40 Harv. L. Rev. at 205, 206, n. 227. A representative democracy relies upon the creation of a favorable public opinion for the acceptance and thus the enforcement of new legislation.

<sup>38</sup> Wilson, *Congressional Government* (1885), as quoted in *Tenney v. Brandhove*, 341 U.S. 367, 377.

We need not proceed further with this suggestion, in this particular case, since bringing information to public attention is one of the objects of the principle of disclosure which, in our view, Congress could embody in valid legislation. *Supra*, pp. 59-63; *infra*, pp. 66 *et seq.* If such legislation could be enacted, Congress could perform the same function directly through its own agencies.

### B. *There is no interference with First Amendment rights*

In the Court of Appeals' opinion, the First Amendment is invoked in a dual aspect:—first, to deny to Congress all competence in this area, either in passing legislation or in fulfilling any other function; and, second, to brand the Select Committee's demand for information as in itself a violation of the rights of free speech and press. We shall deal with these interrelated points together, since compulsory *ad hoc* disclosure to the Select Committee is closely akin to regularized disclosure required by statute or by Congressional policy.

1. As stated above (in Point III, A *supra*, pp. 58-59, 62-63), the Select Committee's demand on respondent was valid unless all possibility of disclosure legislation in this field is forbidden by the First Amendment. That could only be so if such a statute necessarily amounted to an abridgment of the rights of free speech, free press, or the right to petition. But disclosure of true facts, we submit, need not and does not constitute an abridgment of

First Amendment rights, certainly not where, as here, a legitimate purpose is plainly served.

First, what is the nature of the abridgment alleged? It is certain that requiring the respondent or CCG to disclose the names of larger purchasers is not equivalent to a proscription or punishment by the Government of the publication or distribution of CCG's books or of any of their ideas. No *legal* sanction of any kind is imposed on the expression or dissemination of any ideas by anyone. Nor is either respondent or CCG to be compelled, on pain of legal sanction, to disclose or avow political beliefs they wish to keep private.

The restraint on First Amendment rights is said to arise in this indirect way:—If respondent is forced to reveal the names and addresses of volume purchasers of CCG publications, either now or as the result of legislation, the purchasers will know that there ~~are some~~ Congressional purposes for which their names can be disclosed and published. The suggestion is that this may cause embarrassment or even public disapprobation, and some may be deterred from becoming volume purchasers of CCG's books. The freedom of these purchasers to communicate their ideas is thus limited, it is said. In turn, the financial support of CCG is diminished, and thereby its freedom to communicate ideas by selling books is limited. Stripped to its essentials, the restraint relied upon is the social consequence of disclosure on some one else. Respondent and CCG are not concerned about *legal* sanctions which

will discourage the purchasers. They are disturbed about opprobrium and pressures which they suppose that other members of the community will direct at supporters of CCG, if their names are disclosed.

Disclosure of the facts may actually lead to a restraint in this sense, but the issue is whether this sort of indirect non-legal consequence of public disclosure amounts to an abridgment of First Amendment rights by the Federal Government. Similar peripheral non-legal restrictions, flowing from legitimate governmental action, are common and most often unavoidable. Civil and criminal libel and slander provisions undoubtedly deter some people from communicating ideas which are actually permissible but which they fear will provoke litigation (*cf. Beauharnais v. Illinois*, 343 U.S. 250). Legislation requiring disclosure of election campaign contributions (*Burroughs and Cannon v. United States*, 290 U.S. 534, 545), or forbidding anonymous political flyers, will cause some to refrain from supporting, with money or publicity, the candidate of their choice. The same is probably true of the disclosure requirements incident to second class mailing privileges (*Lewis Publishing Co. v. Morgan*, 229 U.S. 288). The existence of the Hatch Act probably deters some federal employees from activity freely permitted by that statute (*United Public Workers v. Mitchell*, 330 U.S. 75). Perhaps, the Smith Act and the sedition statute (*Dennis v. United States*, 341 U.S. 494), the non-

communist affidavit provision of the Labor Management Relations Act (*American Communications Association v. Douds*, 339 U.S. 382), and the unfair labor practice provisions of the National Labor Relations Act (*National Labor Relations Board v. Virginia Elec. & Power Co.*, 314 U.S. 469), have comparable effects on certain individuals. Even the prospect of being called as a witness in a proceeding before a court or other tribunal, or of being investigated by a public or private agency, may discourage some people from uttering, even privately, wholly permissible ideas.<sup>39</sup>

In short, there is frequently self-“censorship” or self-restraint in expression or communication, stemming from but going beyond a legal requirement, but the First Amendment has never been thought to invalidate the law or other Government action because of such tangential, voluntary consequences. Caution, a liking for privacy, timidity, or the desire to be free of controversy or litigation, may impel people voluntarily to refrain from expressing their views in order to avoid all chance of incurring some *legal* sanction—which is not actually imposed on or related to the expression of those views—but that does not mean that any law has abridged their freedom of speech or press. The bur-

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<sup>39</sup> The National Labor Relations Act (*Associated Press v. National Labor Relations Board*, 301 U.S. 103), the Fair Labor Standards Act (*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186), and the Sherman Act (*Associated Press v. United States*, 326 U.S. 1), as well as the income tax, may likewise have affected publication by existing or potential publishers.



den, non-existent for some but actual for many, is one which must be borne along with others as part of the price of citizenship in a necessarily imperfect world.

This is all the more true, of course, when the sanction feared is not legal at all, but social or economic, such as a hostile public reaction resulting from disclosure of opinions or activities. So here, if disclosure of the purchasers' names and addresses, either in the investigation or as a result of legislation, serves a proper purpose—as we show immediately below that it does (*infra*, pp. 70 *et seq.*; see also *supra*, pp. 30, *et seq.*)—the indirect voluntary “restraint” on their or CCG’s communication of ideas does not call the First Amendment into play.<sup>40</sup>

2. Whatever may be the wisdom of adopting it, there can be no denial that compulsory disclosure of facts relating to groups seeking to influence federal legislation could advance legitimate public interests, as the Congress would perceive them. The intricate back-and-forth process between representative and represented, which is the gist of the democratic form of government, has brought forth two central problems with which Congress can rightly concern itself. The first is to ascertain correctly

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<sup>40</sup> None of the several disclosure statutes now on the books of the federal and state governments (*supra*, pp. 59-61) has been held, so far as we are aware, to violate First Amendment rights. The District Court for the District of Columbia, which voided the Federal Regulation of Lobbying Act (fn. 31, *supra*, p. 61), did not base its holding on the First Amendment, except as to the statute’s penalty clause forbidding a person convicted of a violation from influencing legislation during a three-year period.

the true will, desires, needs, and hopes of the people as a whole, and of the different groups in the Nation. The other aim is to secure the facts, all the facts, on which to build legislative action. Without both kinds of knowledge, legislation is hobbled and to that extent representative government fails in its exacting goals.<sup>41</sup>

For at least forty years, as our survey in Point II shows (*supra*, pp. 30 *et seq.*), Congress has been much concerned with the relationship between these two prime ends of opinion-finding and fact-finding, on the one hand, and the groups and organizations which seek to encourage or retard Congressional action, on the other. Despite the remarks of the court below on the unsullied beneficence of such activity (R. 203, 208), there have been many, inside Congress and out, disturbed by the thought that proper attainment of the two fundamental aims has been partially frustrated by persons with special axes to grind. Congress, in legislation, has an obligation to the general welfare which "is not the mere sum \* \* \* of Maine potatoes, Texas oil, Wyoming wool, Colorado silver, Mississippi cotton, and Georgia peanuts." Hearings, Select Committee, 81st Cong., 2d sess., pt. 1, p. 100. As those interests, and their like, have borne down upon it, Congress has repeatedly undertaken to determine for itself how much it has

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<sup>41</sup> The Legislative Reorganization Act of 1946 resulted from a deep concern with both aspects. See *supra*, pp. 35-36. The Regulation of Lobbying Act was part of the Legislative Reorganization Act, and the same concern underlies many of the other proposals for disclosure legislation relating to "lobbying", discussed *supra*, pp. 37-43, 61-62, and *infra*, pp. 72-75.

been subject to pressures only partially representative of the total interest, and how much these pressures have distorted its functioning. The belief has grown, in important segments of Congress and the Nation, that organized "pressure" groups have partly succeeded in artificially creating "public opinion," thereby confusing the normal and proper operation of the legislative process and the assumptions on which the First Amendment is based.

Serious concern has also been expressed whether the development of mass media of communication does not at once reveal and develop certain tendencies in our national life which endanger the premises on which representative self-government is founded. See *e.g.*, I Chafee, *Government and Mass Communications* (1947), pp. 8-29; cf. Hocking, *Freedom of the Press* (1947), pp. 12-21, 41-50, 51-78, 84.<sup>42</sup> The testimony of scientific psychology underscores the assumptions on which some of this concern is based. See Hartley, *The Social Psychology of Opinion Formation*, 14 Pub. Op. Quar. 668; Fisher, *Public Opinion as a Process in So-*

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<sup>42</sup> And see Hocking, *op. cit. supra*, at pp. 148-149:

"The public cannot expect to find 'the truth' furnished it ready made by any speaker or writer; with the best efforts of the press, the reader must still work for it. But if the reader is constantly baffled, he may reach the conclusion that, for him, the truth is not to be had, either because the 'best efforts' of the press are not bent to that end, or because truth is inaccessible, or because it is 'relative' and each interpreter has a right to his own. \* \* \* If the typical American reader reaches this stage of disillusion, government by public opinion necessarily loses its case and gives way to what we increasingly have, government by competing pressures, each of which has its *version* 'legitimately' corrupted by its interest."

ciety, 14 Pub. Op. Quar. 674. And see Note (1951), 51 Col. L. Rev. 98, 105-106 (collecting authorities indicating the limited appeal, as shown by experience and experimental psychology, of reasoned argument, and the variety of reasons for this limited appeal); Comment (1947), 56 Yale L. J. 304, 306-313.

The aim of the responsible students, public and private, has not been to silence or prohibit the "interest" or "pressure" groups, but to utilize some measure of factual disclosure in an attempt to remedy the imbalance which has been found, without forbidding or limiting the expression of ideas. There might, of course, be indirect disclosure of the political ideas of some persons whose views may now be relatively private (*e.g.*, some larger purchasers of CCG's books), but only of those who affirmatively engage in attempting to affect public opinion in the political sphere.<sup>43</sup> And such disclosure of these activities would enable Congress and the public, it is believed, better to appraise the source and true worth of the facts and arguments brought forth, and thus to reach wiser judgments on public issues relating to federal legislation.

These permissible purposes of the principle of disclosure were summarized in the dissenting :

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<sup>43</sup> By way of perhaps unnecessary *caveat*, we emphasize that our entire discussion of disclosure relates only to groups, like CCG, which are concededly engaged in actively influencing mass public opinion on federal matters—and so far as this case is concerned the disclosure need relate only to *facts* such as names and addresses. We are not here concerned with the activities of private individuals or of those groups which do not deliberately seek, as a major activity, to influence opinion on federal matters.

opinion of Mr. Justice Black, in *Viereck v. United States*, 318 U. S. 236, involving the Foreign Agents Registration Act (22 U.S.C: 611, *et seq.*) (in which the Court found it unnecessary to pass on the statute's constitutionality because it held Viereck's activities not within its purview). Mr. Justice Black said (at p. 251):

\* \* \* Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment. \* \* \*

See, also, *Associated Press v. United States*, 326 U. S. 1, 20, 28, recognizing that it is a proper governmental interest to maintain the conditions on which the freedom of expression depend. *Cf. Burroughs and Cannon v. United States*, 290 U. S. 534, 545 (Corrupt Practices Act); *Best v. Sidebottom*, 270 Ky. 423, 430, 431 (right of public to know character of campaign contributors); *La Belle v. Hennepin Co. Bar Assn.*, 206 Minn. 290, 295-6 (the same).

We think it significant, too, on the relationship of disclosure legislation to the First Amendment, that the President's Committee on Civil Rights, ever zealous to protect civil liberties, reported (see *To Secure These Rights*, 1947, p. 53) that the principle



should be extended "to all of those who attempt to influence public opinion" and the federal government "ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion." See, also, Ernst, *The First Freedom* (1946).

3. The same conclusion of validity may be reached by a somewhat different verbal route, if it be assumed that the self-restraint consequent upon disclosure can in some circumstances be a restraint to which the First Amendment would apply. It is a truism that First Amendment rights are not absolute. The Court has noted that even where freedom to criticize the courts was involved, "reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." *Pennekamp v. Florida*, 328 U. S. 331, 336. In *United Public Workers v. Mitchell*, 330 U. S. 75, the Court, in upholding the Hatch Act, declared that it "must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government" (p. 96), and in that connection considered the connection between the prohibitions of the statute and its object, the limited restrictions on freedom to speak, and the large public interest in the efficiency of the government (pp.

94-103). See *American Communications Association v. Douds*, 339 U. S. 382, 404-5, and 402-12. Cf. e.g., *Cox v. New Hampshire*, 312 U. S. 569, 574; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-2; *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469; *Valentine v. Chrestensen*, 316 U. S. 52; *Prince v. Massachusetts*, 321 U. S. 158, 168-170.

In this case, the restraint on freedom of expression is, at most, a minor and limited one and can hardly be deemed heavy. The suggestion that freedom of expression will be seriously restricted because the purchasers of CCG's books will be discovered to be supporters of that organization or of any so-called "pressure group" seems to us fairly remarkable. At the most, the self-imposed restriction is likely to be less than in most of the comparable situations involving self-restraint or self-"censorship" which we have listed above (*supra*, pp. 68-69).

On the other hand, the interest in favor of which this minor restraint on freedom of expression would be undertaken can properly be characterized as fundamental and important:—Congress' belief that the preservation of the integrity of the legislative process requires disclosure of supporters of groups deliberately seeking to influence it by affecting or creating mass public opinion. See *supra*, pp. 30-45, 70-75.

There would seem to be no question as to how these opposing interests—the one weak, the other strong—should be balanced, if balancing is to be done. But, unlike its position in *Barsky v. United*

*States*, 167 F. 2d 241, certiorari denied, 334 U. S. 843, the stand of the Court of Appeals here was that the interests served by disclosure were outweighed by CCG's and respondent's personal rights. See R. 201-203. We respectfully submit that the majority of the court below took this position only because it misconceived the "public necessities in this matter" (*Barsky v. United States, supra*, at 249): i.e., the nature and history of the problem which Congress felt was before it and which it committed to the Select Committee.<sup>44</sup> In the light of that history and Congress' own knowledge, it cannot be judicially said that the problem is unreal or miniscule. Certainly, the problem was large and important enough to justify the slight contraction in the alleged rights of CCG, its purchasers, and respondent.

4. Thus far, in our discussion of the First Amendment (*supra*, pp. 66-77), we have not separated general legislation requiring disclosure from the Select Committee's *ad hoc* demand for disclosure. We have urged the validity of both, and for the same reasons. But we also believe that the Committee's *ad hoc* demand in the course of inquiry must be upheld even though general legislation compelling disclosure of the names of CCG's larger purchasers would probably be voided or Congress forbidden to

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<sup>44</sup> The court remarked that "There is no suggestion that the publication or distribution of these books and documents constitutes any public danger, clear or otherwise, present or otherwise" (R. 203). That is quite true, of course. The suggestion is that disclosure of the larger distributors of the books and pamphlets may give Congress needed information, and undisclosed distribution may adversely affect its operations.

compel by continuous inquiry a regular, repeated disclosure of names:

The reason is, as suggested, in Point I (*supra*, pp. 23-24), that a Congressional committee investigating the need for legislation has inquiry power broader than Congress' authority to legislate. It must be able to elicit all the relevant facts bearing on its problem, including those demonstrating that there is no present need or possibility of valid legislation. The instant Select Committee, for instance, had power to discover the names of the purchasers so that it might conclude from its survey that general disclosure legislation was needless and unjustified. But so long as the inquiry was in good faith it would not be until the facts were known that that conclusion could be reached.

This need for accurate first-hand information as a basis for governmental action outweighs such temporary interference with personal rights as may result from the compelled disclosure. As with the witness at a trial whose First Amendment rights may allegedly be restricted by forced disclosure of hitherto private beliefs, actions, or ideas, the personal interests of the witness before a Congressional committee must give way to more important needs of the community as a whole. *Cf.*, R.S. 103, 2 U.S.C. 193, quoted *infra*, p. 80.

C. *There is no interference with protected rights of privacy*

Though the point is not made by the court below, it may be well to discuss briefly, as applied to this



case, some aspects of the so-called "right of privacy" which is often mentioned in comments on Congressional inquiries and disclosure legislation. See, e.g., Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, (1948) 47 Mich. L. Rev. 181, 219-222.

1. If it were said that, apart from the First Amendment, an undefined right of privacy protected by the Due Process Clause of the Fifth Amendment forbids any disclosure legislation relating to CCG or similar groups, we would urge that, since disclosure here serves a legitimate Congressional end (*supra*, pp. 70-75), the disclosure cases and statutes listed above (*supra*, pp. 59-61) furnish the sufficient answer to claims of privacy. Like the persons affected by the disclosure legislation which has already been upheld, only those would be affected here who have voluntarily come into the public common and become active vendors "in the market place of public opinion." See also *United States v. Morton Salt Co.*, 338 U.S. 632, 651-652; *Public Utilities Commission v. Pollak*, 343 U.S. 451, 463-466.

2. As for a witness' general right to maintain his privacy before a Congressional Committee, it is now well settled that where the inquiry is legitimate the witness, like a witness in court, cannot refuse to disclose the requested information on the ground that it relates to personal or private affairs. See Point I, *supra*, pp. 25-26. No more than a witness at a trial was respondent free to refuse to produce the records because discovery invaded



his privacy or might bring unfavorable publicity, public disapproval, or even financial reverses. On this point, too, the public interest in full disclosure clearly outbalances the injury to the individual. This Congress has recognized, since 1862, in R.S. 103, 2 U.S.C. 193, which declares that no witness before a Congressional committee is privileged to refuse to testify "upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." <sup>45</sup>

<sup>45</sup> The Report on Congressional Investigations (dated November 22, 1948) of the Committee on the Bill of Rights of the Association of the Bar of the City of New York states (pp. 3-4):

There seems to be prevalent a belief, although, somewhat vague, that the individual American is endowed with some sort of a 'right of privacy' which exempts him from inquiry into his private affairs. One hears it suggested that such an inquiry violates some protection afforded by the Bill of Rights. We know of no 'right of privacy' or constitutional guarantee which makes a citizen immune to the giving of evidence where an inquiry is being made by a legally constituted Congressional committee engaged in a legitimate investigation—any more than a citizen is immune from having to give relevant testimony in a trial before a court of law. The questions, of course, must be relevant to the subject under investigation, and the decisions of the Supreme Court already protect the individual from being required to answer questions which are not pertinent to the inquiry. But, assuming that the question is material and relevant to an inquiry in aid of a lawful purpose of Congress, we do not believe that the individual is immune from being required to answer merely because the question delves into his private affairs, his previous utterances or his affiliations, political or otherwise. It is not necessary for the purpose of this report to attempt to predict what the courts may hold with respect to the inquiry into an individual's privately entertained belief, except to say that at all events a court would probably insist that the relevancy of such an inquiry be clearly established and that this would be true only in rather exceptional circumstances.

## CONCLUSION

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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## APPENDIX A

## LEGISLATIVE REORGANIZATION ACT OF 1946

## 1. Title III—Regulation of Lobbying Act (60 Stat. 812, 839; 2 U.S.C. 261-270)

## SHORT TITLE

Sec. 301. This title may be cited as the "Federal Regulation of Lobbying Act".

## DEFINITIONS

Sec. 302. When used in this title—

(a) The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

(b) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term "Clerk" means the Clerk of the House of Representatives of the United States.

(e) The term "legislation" means bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.

## DETAILED ACCOUNTS OF CONTRIBUTIONS

Sec. 303. (a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of—

(1) all contributions of any amount or of any value whatsoever;

(2) the name and address of every person making any such contribution of \$500 or more and the date thereof;

(3) all expenditures made by or on behalf of such organization or fund; and

(4) the name and address of every person to whom any such expenditure is made and the date thereof.

(b) It shall be the duty of such person to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding \$10 in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

## RECEIPTS FOR CONTRIBUTIONS

Sec. 304. Every individual who receives a contribution of \$500 or more for any of the purposes hereinafter designated shall within five days after receipt thereof rendered to the person or organization for which such contribution was received a detailed account thereof, including the name and

address of the person making such contribution and the date on which received.

# STATEMENTS TO BE FILED WITH CLERK OF HOUSE

Sec. 305. (a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing—

(1) the name and address of each person who has made a contribution of \$500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of \$500 or more to such person since the effective date of this title;

(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

(3) the total sum of all contributions made to or for such person during the calendar year;

(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of \$10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);



(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

#### STATEMENT PRESERVED FOR TWO YEARS

Sec. 306. A statement required by this title to be filed with the Clerk—

(a) shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the Clerk of its nonreceipt;

(b) shall be preserved by the Clerk for a period of two years from the date of filing, shall constitute part of the public records of his office, and shall be open to public inspection.

#### PERSONS TO WHOM APPLICABLE

Sec. 307. The provisions of this title shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be

used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

#### REGISTRATION WITH SECRETARY OF THE SENATE AND CLERK OF THE HOUSE

Sec. 308. (a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what

purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

## REPORTS AND STATEMENTS TO BE MADE UNDER OATH

Sec. 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

## PENALTIES

Sec. 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than \$5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

## EXEMPTION

Sec. 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

## 2. Separability Clause (60 Stat. 812, 814)

Sec. 1(b) *Separability Clause*. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

### APPENDIX B

#### PARTIAL BIBLIOGRAPHY ON LEGISLATIVE INVESTIGATIONS

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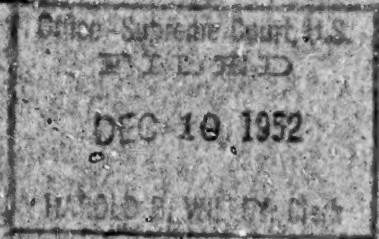
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**No. 87**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1952**

---

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**EDWARD A. RUMELY**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**REPLY BRIEF FOR THE UNITED STATES**

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## REPLY BRIEF FOR THE UNITED STATES

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In this Reply Brief we shall deal with certain of respondent's contentions which we believe warrant further elaboration.

### I.

#### **Resolution 298 is not void for indefiniteness**

Respondent appears to urge that Resolution 298 which authorized the investigation in question is void for indefiniteness and therefore he cannot be held liable for refusing to produce the records demanded by the Select Committee and the queries put to him (Resp. Br. 24-26). The answer to this contention is two-fold: (1) there is no requirement of definiteness for resolutions empow-

ering legislative committees to investigate, and (2) respondent was sufficiently apprised of the pertinence of the demands made upon him.

1. *There is no requirement of definiteness for resolutions empowering legislative committees to investigate.* No provision of the Constitution—and nothing in its basic structure—limits the powers of inquiry which Congress may bestow on any committee, so long as it does not go beyond the sphere over which Congress itself has authority. There is no doctrine of separation of powers as between Congress and its committees. If it were feasible, Congress or one of its Houses could conduct an investigation itself, without delegating its authority to any committee. In the beginning, the Senate had only 26 members, less than some present committees,<sup>1</sup> and only slightly more than the 21 members on the present Senate Committee on Appropriations. 60 Stat. 815. Indeed, R. S. 102 still refers to matters “under inquiry before either House \* \* \* or any committee of either House.”

Such a Congressional inquiry could be conducted without any underlying statute or resolution defining its scope. The inquiry would necessarily be limited to facts relating to subjects which Congress had constitutional authority to investigate. It would be necessary to show that

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<sup>1</sup> Most House committees have 25 or 27 members. The Committee on Appropriations consists of 43 members. 60 Stat. 822.



a particular question pertained to such a subject, but the absence of a resolution describing the subject to be investigated would not render the whole proceeding void.

The Committees sit as arms of Congress, not as subordinate agencies. And the necessities of their relationship to Congress require that the subjects over which they have jurisdiction be broadly defined. All regular standing committees—at least in the Senate (Legislative Reorganization Act, 1946, Sec. 134, 60 Stat. 831–832)—may make “investigations into any matter within its jurisdiction”.<sup>2</sup> The Committees on Interstate and Foreign Commerce, for example, have jurisdiction over “interstate and foreign commerce generally”, *inter alia* (60 Stat. 817, 826); the Committees on Agriculture over “agriculture generally”, *inter alia* (*id.*, at 815, 823); the Committees on the Armed Services over “common defense generally”, *inter alia* (*id.*, at 815, 824); and the Committees on Appropriations simply over “appropriation of the revenue for the support of the Government” (*ibid.*)—which might

<sup>2</sup> Investigations are authorized in the House by special resolution. But these resolutions frequently authorize the standing committees merely “to conduct thorough studies and investigations relating to matters coming within the jurisdiction of such committee”. See, for example, House Resolution 141, 80th Cong., 1st sess., printed at 93 Cong. Rec. 5057, which uses the above language in authorizing the Committee on Armed Services to conduct an investigation; House Resolution 93, printed in 93 Cong. Rec. 5058.

permit inquiry into every subject for which Congress does or could be asked to appropriate money. These definitions of the powers of Congressional committees are far broader than the standards of definiteness required in criminal statutes. They are far broader than the standards applicable when the Congress is delegating authority to the Executive Departments or agencies. No administrative body could be empowered merely to regulate "interstate or foreign commerce generally." Cf. *Schechter Poultry Corp. v. United States*, 295 U. S. 495. And yet no one has ever suggested that these committees are unconstitutional, or that they lack power to investigate, because of the sweep of their authority.

But respondent seems to argue that the rule as to definiteness of criminal statutes becomes applicable in a prosecution for refusing to testify before a committee, that R. S. 102 and the statute or resolution embodying the Committee's authority must be read together as an integrated criminal law, and that if the authorizing resolution so read does not satisfy criminal law standards of definiteness it must be deemed unconstitutional in so far as compelling testimony from witnesses is concerned. Acceptance of this argument would impose upon the Congressional power to create committees requirements as to specificity entirely inconsistent with practice and history, and without any constitutional basis. For the long exercised power to establish committees with general

investigating authority would be futile if such committees could not demand the prosecution of witnesses who would not testify.

No such limitation is essential to protect witnesses against essential unfairness or infringement of their right not to be questioned about matters outside the constitutional authority of Congress. We turn to the criminal statute, R. S. 102 (Govt. Main Br. 2), to see whether it gives a witness or prospective witness an "ascertainable standard of guilt" (*Winters v. New York*, 333 U. S. 507, 515), without regard to the generality of the statute or resolution by which the committee is created.

The first portion of R. S. 102 provides that "every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House \* \* \* or any committee of either House of Congress, willfully makes default" shall be guilty of a misdemeanor. The ingredients of the crime are that the witness must be summoned to give testimony, that it be on a matter under inquiry, and that he "willfully makes default". There is nothing indefinite about any of these factors insofar as the witness is concerned. The statute does not leave it to the witness to determine the nature of the matter under inquiry; he need only know that the summons is to testify on a matter which is under inquiry. And this is a reasonable

means of exercising the power of Congress to investigate. The defaulting witness is not thereby deprived of his right to defend against prosecution on the ground that the whole proceeding is unconstitutional for some other reason, but that does not go to the definiteness of the statutory obligation.

Nor is the second clause of R. S. 102, which punishes refusal "to answer any question pertinent to the question under inquiry," made unconstitutionally indefinite by the generality of the statute or resolution creating the investigating committee. If we assume that the witness must have a basis for judging the pertinence of the "question under inquiry" in order to determine whether he must answer, it does not follow that such information is obtainable only from the resolution creating the committee. A witness might not, of course, be aided by reference to "the common defense generally" or to "interstate and foreign commerce generally." But the precise question under inquiry in an investigation or in a portion of it would normally be perfectly obvious at the time of the question, from the previous history of the inquiry. A witness who honestly had doubts could ask the committee before deciding whether to answer a particular query.

2. *Respondent was sufficiently apprised of the pertinence of the demands made upon him.* Even if we assume that resolutions, rules, or statutes

creating legislative committees must satisfy some standard of definiteness, Resolution 298 would be valid. If any such requirement exists, the standard of definiteness required must be a broad one, not the narrower rule applicable to criminal statutes. And the materials discussed in our main brief at pp. 28-45 demonstrate that the Resolution's key phrase—"all lobbying activities intended to influence, encourage, promote, or retard legislation"—has a sufficiently definite meaning to delimit the Select Committee's inquiry and to set bounds to its work. In our view, it is undeniable—on the basis of the Resolution's wording and immediate legislative history, the scope of previous Congressional inquiries into "lobbying," the Select Committee's own understanding of its mission, and the particular evidence presented to it in the first part of its hearings—that the Committee was authorized to probe into organized attempts of groups such as CCG to influence legislation through public opinion, and in that connection to consider the workings of the Regulation of Lobbying Act of 1946. If we are right in that view, there can clearly be no doubt that Resolution 298 was sufficiently definite for inquiry purposes. If we are wrong, respondent may prevail in his contention that the demands made upon him were not pertinent to the inquiry the House authorized by Resolution 298, but the Resolution itself cannot be characterized as invalid.



Respondent cannot properly complain that there was no way of discovering whether the particular demands made upon him were "pertinent" to the "question under inquiry." By the time he appeared before the Select Committee, the scope of the investigation was plain as a pikestaff to him and to the members of the Committee. He knew exactly what the Committee deemed to be the subject matter of its inquiry when it was investigating CCG and the other organizations into whose activities it probed in the second phase of its investigation (see Govt.'s Main Br. 36-45, 52-57). He did not refuse to comply on the ground that he did not know, and could not discover, what the Committee was driving at. On the contrary, his refusal was placed squarely on the ground that he knew precisely what the Committee was trying to discover, and he believed that they had no right to make that type of inquiry because the First Amendment forbade it. In short, it was his view that the demands were "pertinent" to the "question under inquiry" by the Committee, but that the Constitution prohibited the Committee from inquiring into that question at all. But respondent's mistake of law would be no more excuse than was Sinclair's comparable "mistaken view of the law." *Sinclair v. United States*, 279 U. S. 263, 299. And see Point II, *infra*.

## II

**"Willfully" as used in R. S. 102 means deliberately or intentionally**

Respondent argues that bad faith or bad purpose is an essential ingredient of "willfulness" under R. S. 102, and that the trial court's charge (R. 177) was therefore erroneous (Resp. Br. 53-55).

*Sinclair v. United States*, 279 U. S. 263, 299, indicates the error in that view. Moreover, the word "willfully," as used in R. S. 102, has several times been expressly interpreted by the Court of Appeals for the District of Columbia Circuit as requiring deliberate or intentional conduct, but not necessarily an evil or bad purpose. *Fields v. United States*, 164 F. 2d 97, 99-100, certiorari denied, 332 U. S. 851; *Townsend v. United States*, 95 F. 2d 352, 357-358, certiorari denied, 303 U. S. 694; *Eisler v. United States*,

<sup>3</sup> In the *Townsend* case the Court of Appeals stated (p. 358):

"\* \* \* The meaning of the word depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.' *American Surety Co. v. Sullivan*, 2 Cir., 7 F. 2d 605, 606. In *United States v. Edwards*, C. C., 43 F. 67 (cited by appellant) the court said: 'Willfully means with design, with some degree of deliberation.' In *Grand Trunk Ry. Co. v. United States*, 7 Cir., 229 F. 140, 149, the court said: 'The word "willfully,"

170 F. 2d 273, 280, 284, certiorari dismissed, 338 U. S. 883; *Dennis v. United States*, 171 F. 2d 986, 990-1, certiorari denied on this point, 337 U. S. 954, affirmed on another point, 339 U. S. 162.

We think that these decisions should be followed.

This Court has frequently pointed out that "willful" is a word, "of many meanings, its construction often being influenced by its context."

*Spies v. United States*, 317 U. S. 492, 497; *United States v. Murdock*, 290 U. S. 389, 394; *United States v. Illinois Central R. Co.*, 303 U. S. 239; *Screws v. United States*, 325 U. S. 91, 101. In the *Illinois Central* case, the Court observed (303 U. S. at 242-243):

\* \* \* In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U. S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act."

as used in the act, has a number of times engaged the attention of the court, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts. \* \* \*

Making default before a congressional committee is not an offense involving moral turpitude (*Sinclair v. United States*, 279 U. S. at 299). A consideration of the nature of the offense and its context demonstrate that "willfully," as used in R. S. 102, can mean no more than deliberately and intentionally.

The statute provides for punishment of persons who "willfully make default." If "willfully" meant with a bad or evil purpose, and not merely deliberately, any person who did not believe it right or lawful for a congressional committee to summon him, or make demand upon him, would be completely immune from punishment. Such a witness would gain substantially complete immunity by setting up his own "good faith judgment" against that of the committee on the question of the committee's power. Congress obviously did not intend that its process be so flouted even by persons acting in good faith, for the effectiveness of its compulsory investigative power would be greatly impaired if such a defense were available. The type of offense under consideration and the purpose of the statute show that "willfully" could not have meant more than deliberately and intentionally.

The *Sinclair* case, 279 U. S. 263, confirms this view. That case involved the second clause in R. S. 102, "refusal to answer pertinent questions."

In rejecting the contention that good faith was a defense, the Court said (p. 299):

There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co. v. United States*, 209 U. S. 56, 85. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49.

The clause of R. S. 102 involved in the *Sinclair* case did not contain the word "willfully."<sup>4</sup>

<sup>4</sup> Count 7 of the present indictment, on which respondent was convicted, is clearly laid under the same clause of R. S. 102 as the indictment in the *Sinclair* case (R. 4). Since Counts 1 and 7 use the terms "willfully" and "did make default" (R. 3), and the trial judge defined "willfully" in his charge (R. 177), we do not stop to consider whether those counts also were actually laid under the second clause of the statute, rather than the first. Respondent appeared, answered some queries, and produced some records (unlike Eisler and Josephson), but refused to produce certain particular records "upon the matter under inquiry" (as the in-



But as the above excerpt from the opinion indicates; the phrase "refuses to answer" (not "fails to answer") in itself denotes intentional conduct. And we think it clear that Congress did not intend the two phrases in the same sentence to have totally different meanings. For there would be no basis in reason for requiring witnesses to answer questions despite their good faith reliance on advice of counsel, and yet permitting them to use the same advice as an excuse for not appearing at all, or defaulting in the production of records, generally a much more serious interference with the investigatory power.

Respondent relies on the *Murdock* case, which also involved a failure to supply information, in that case to the Bureau of Internal Revenue. But the Court held "willfully" there to include an element of bad faith, largely because the informational requirement was joined in a sentence containing substantive obligations to which the requirement of willfulness also pertained. The Court said (290 U. S. at 395-396):

Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States v. Sioux City Stock Yards Co.*, 162 Fed. 556, 562); and, we think, in the present instance the other omissions which the

dictment charges). This can be said to be equivalent to a refusal to answer a question pertinent to the question under inquiry, rather than to a mere default in appearing.

statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who "willfully" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. *Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.* [Emphasis supplied.]

The same approach to the present case shows that "willfully" has the less stringent meaning, for here the word is used in the context of the clause considered in the *Sinclair* case. As we have shown, Congress would not have intended the two clauses to have different meanings insofar as the factor of intent is concerned. And the punishment for failure to appear or testify is not coupled with substantive crimes with respect to

which Congress might have wished to require the existence of an evil or bad purpose. The statute thus clearly differs from that in the *Murdock* case.<sup>5</sup>

### III

#### **Pertinency has been properly shown**

Running throughout respondent's brief is the complaint that the Government's case in this Court is a case which the United States Attorney refused to have tried, and that respondent is therefore prejudiced by having to meet in this Court a case which he could only meet by producing evidence at the trial which he was not permitted to introduce there (Resp. Br. 3-6, 9-10, 13-20, 49-50, 56-57). This contention does not accord with the record, and disregards the nature of the Government's arguments here and in the trial court as well as the established rules applicable to trials under R. S. 102.

1. Respondent argues as if the only matter in evidence before the trial judge, in passing on pertinency, was the fact that CCG and the respondent had registered (under protest) under the Regulation of Lobbying Act. We have shown

<sup>5</sup> *Morissette v. United States*, 342 U. S. 246, also cited by respondent (Resp. Br. 55), involved a statutory crime which was intimately related to, and stemmed from, common-law crimes having criminal intent as an ingredient. There is no occasion, therefore, to consider the relationship of such criminal intent to the "good faith" motive respondent presents as a defense.

(Govt. Main Br. 45-47) that that single fact, which was the Government's main reliance at the trial, would be enough to show pertinency, particularly since the demands were for information as to payments received by CCG after the Lobbying Act went into effect in 1946 (R. 2-4). But the truth is, as the printed record shows, that much more was specifically brought to the judge's attention by counsel for the Government or for respondent.

*First*, substantial segments of the Select Committee's interrogation of respondent were read, without objection, by counsel or witnesses (R. 23-30, 32-34, 41-42); that testimony showed, among other things, that CCG sent to Congress releases and other material (R. 32), that it distributed much printed matter (R. 29, 32; see also R. 89-91, 112), and that, in the opinion of the Committee's counsel, at least part of this material dealt specifically with proposed or pending pieces of legislation, which were enumerated (R. 41-42; see also Govt. Main Br. 54). In addition, respondent's Lobbying Act registrations, which were admitted into evidence, declared that CCG sometimes took a stand for or against legislation (R. 186). Government counsel expressly urged pertinency on the ground that the publications distributed by CCG dealt with federal legislation (R. 67).

*Second*, the matter of possible evasion or subterfuge was touched upon at the trial. The prose-

utor argued that the Select Committee had a right to learn the name of a person who gave \$2,000 for the distribution of a book (as charged in Count 6), "having always in mind that the contributors to a lobbying organization are at all times subject to listing under the Act, and therefore we say of course the committee could inquire" (R. 41). This was a plain reference to the fact that a so-called "purchaser" *might* be a "contributor" whose name should have been reported. The prosecutor also said that the Committee could inquire "as to whether or not the present Act [the Lobbying Act] was working properly" (R. 41), and, again with reference to the \$2,000 payment from Toledo, he said (R. 67):

It wasn't that she was buying \$2,000 worth of that book—probably a number of thousand copies of it; she was giving \$2,000 to the organization for the distribution of the book, an entirely different situation, and *one exactly within the purview of this committee to determine whether there was any violation of the Lobbying Act, or whether it was an activity that was not even included in the Act.* It was clearly within the field that they could investigate [for] their legislative purposes. [Emphasis supplied.]

It seems clear, therefore, that the main lines of the argument we make here to show pertinency were before the trial judge, and respondent is



incorrect in his cry of change-of-position and prejudice.<sup>6</sup>

2. Respondent now declares, however, that he did not introduce at the trial (but could have done so) evidence that the book-payments were not *in fact* disguised "contributions" reportable under the Lobbying Act (see Resp. Br. 5, 14-15, 19). This startling contention entirely neglects the cardinal rule that in passing on pertinency the judge is not determining truth or falsity; it was not his function, in this case, to decide whether the "purchasers" were really contributors." That was for the Select Committee to investigate. The judge's only function, at the most, was to see whether there was a reasonable basis, at the time the demands were made on respondent, for the Committee's view that it ought to inquire into the matter of CCG's possible violation, evasion, or legal circumvention of the Lobbying Act. See Govt. Main Br. 50-52; *Okla. Press. Pub. Co. v. Walling*, 327 U. S. 186; *Blair v. United States*, 250 U. S. 273; *Sinclair v. United States*, 279 U. S. 263, 298-299. The evidence respondent now says

<sup>6</sup> Respondent admits (Resp. Br. 16) that the Government raised the matter of possible evasion and subterfuge on oral argument in the Court of Appeals. The majority opinion below discusses the matter of evasion at R. 199-200, but is misled by its failure to recognize that when the Select Committee declared that its study had been impeded by respondent's refusal to produce "pertinent financial records," the records it was referring to were those giving the names and addresses of the larger purchasers. See also Govt. Main Br. 50-52.

he would have produced at the trial—in order to show that there was no violation, evasion, or legal circumvention—would not and could not have deprived the Committee's demands, in June and August 1950, of their reasonable basis.<sup>7</sup> As we point out in our main brief (p. 52), the question is not whether the testimony and evidence before the Committee was true and correct, but whether that testimony and evidence made legitimate the Committee's concern with the further information which respondent refused to furnish.

3. Respondent's contention as to the alleged rejected or unproduced evidence also disregards the significant rule that pertinency is for the judge and not the jury. Respondent forgets that the books and materials which were proffered at R. 99-100, as well as the other offers to show further the nature of CCG's activities (R. 102-3), were expressly made to "permit the jury to judge for themselves just what the book purports to hold or preach" (R. 99). Since the jury had no concern with those matters, the judge rightly rejected the proffers, as he did other proffers which respondent's counsel insisted on making for the jury and not for the judge alone (R. 126, 127, 129, 130). For the same reason, the trial court was eminently right, de-

<sup>7</sup>The prosecutor did not claim that the purchasers were *in fact* contributors (see Resp. Br. 14-15), but merely that the Committee had a right to probe into that possibility. See *supra*, p. 17. The District Court so understood (R. 62). Similarly, that is the contention we make here.

spite respondent's complaint here, in charging the *jury* to disregard all speculation on the subject of respondent's activities and of the organization with which he is connected (R. 176). That is not to say that the *judge* disregarded those matters in ruling on pertinency.

4. As for the Select Committee's Contempt Report and the portions of the hearings which were not read by counsel or a witness, we reiterate our view (Govt. Main Br. 48-50) that they were properly before the trial court, were probably considered by it (especially the Contempt Report),<sup>\*</sup> and, in any event, may be considered by this Court. Respondent has not seen fit to take advantage of his opportunity to present to this Court, in answer to the details we cite, any materials to show that the demands made upon him were not pertinent to the Committee's inquiry. We do not believe such a showing could possibly be made, no matter what materials respondent would bring forth, if we are correct in our interpretation of the scope of the Committee's investigation (Govt. Main Br. 29-45, 50-57). Aside from the constitutional question, that issue of the scope of the inquiry is the only "real" issue in this case.

<sup>\*</sup> Respondent's trial counsel said during the trial (R. 61): "I have the hearings here, and Your Honor has the hearings \* \* \*"

Both the majority and the minority opinions below state that the Contempt Report is a part of the record on appeal (R. 196, fn. 4, 214). In his brief in the Court of Appeals, respondent referred to and quoted from the Report.

## IV

Respondent's brief twice states (pp. 25, 46) that we concede that general legislation compelling disclosure of the names of CCG's larger purchasers would probably be invalid. This is a misunderstanding of our position. We make no such concession, and we hope that this is indicated by pages 58-77 and 78-80 of our main brief. The sentence on pages 77-78 of our main brief, to which respondent refers, was intended merely to urge that, *even if it be assumed for the purposes of argument* that such general disclosure legislation would be invalid, still the Select Committee's *ad hoc* demands on respondent would be valid. See our main br., p. 21. Except for the purposes of the single argument at pp. 77-78, we make no such assumption.

## CONCLUSION

For these reasons, and those set forth in our main brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted.

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October Term, 1951

No. 801

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

EDWARD A. RUMELY,

*Respondent.*

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**SUPREME COURT, U. S.**

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

(With Appendix reprinting opinions below)

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— IN THE  
**Supreme Court of the United States**

October Term, 1951

No. 801

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

EDWARD A. RUMELY,

*Respondent.*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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**OPINIONS BELOW**

The opinions in the Circuit Court of Appeals reversing the order and judgment of the District Court and remanding the case to the District Court with instructions to dismiss the indictment are not yet reported. (R. 193-224). For convenient reference the opinions are reprinted as an Appendix to this Brief.

**JURISDICTION**

The decision of the Court of Appeals was rendered on April 29, 1952 (R. 224). The petition for a writ of certiorari was filed on May 28, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).)

## QUESTIONS PRESENTED

1. The first question is whether, under the guise of investigating "lobbying activities", Congress had power, or attempted, to authorize an inquiry and to compel testimony regarding private efforts to influence public opinion regarding federal legislation through the general sale and distribution of books and pamphlets.

2. The second question is whether a Committee of Congress, established for the purpose of investigating "lobbying activities", had constitutional authority (in the absence of any pretense that a "clear and present public danger" existed) to require a publisher, by subpoena or interrogatories, to disclose the names and addresses of purchasers of books published and distributed by him, particularly when the publisher had made available to the Committee all his financial records except the names and addresses of such purchasers.

3. The third question is whether in this criminal action for contempt of Congress there was any evidence sufficient to support a ruling as a matter of law that the names and addresses of purchasers of books published by respondent's employer (in quantities costing over \$500.00) were pertinent to the Committee's inquiry into "lobbying activities".

## STATUTE INVOLVED

R. S. 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to

answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

### COUNTER STATEMENT OF THE CASE

The statement of the case presented by the petitioner is not the case which was tried in the District Court and is not the case which resulted in the decision of the Circuit Court of Appeals for the District of Columbia which is involved here.

Petitioner presents the statement of *one side* of a hypothetical case which was set up as the basis for the dissenting opinion of one judge of the Circuit Court of Appeals and which was characterized in the majority opinion as follows:

"We think our dissenting judge discusses a case not before us—issues not presented in the trial court or here, and facts not in evidence in this record."  
(R. 209 App. 23)

We submit that in a criminal case the proposition is insupportable that a conviction should be sustained on an argument that the defendant *might* have been convicted on charges and evidence that were never submitted to the jury.

The case actually tried and reviewed on appeal is accurately stated as follows:

The respondent, Edward A. Rumely, Executive Secretary for the Committee for Constitutional Government, Inc. (hereinafter described as the "C.C.G."), was subpoenaed to produce records and to testify, by the Select Committee on Lobbying Activities created by the House



of Representatives (hereinafter described as the Buchanan Committee).<sup>1</sup>

The report of the Buchanan Committee to the House<sup>2</sup> states that the C.C.G. distributed, among other things, millions of embossed copies of the Bill of Rights to schools and colleges, 600,000 copies of a book by Thomas James Norton entitled "Constitution of the United States", thousands of copies of a book by Irving G. McCann entitled "Why the Taft-Hartley Law", 130,000 copies of a book by Melchior Palyi entitled "Compulsory Medical Care and the Welfare State", approximately 750,000 copies of a book by John T. Flynn entitled "The Road Ahead", 250,000 copies of a book by John W. Scoville entitled "Labor Monopolies and Freedom".

The record indicates that about 85% of the books sold by the C.C.G. were in lots of from one to twenty copies and the remainder in bulk sales. Said bulk sales were by three methods: (a) the purchaser bought the books and distributed them; or (b) the purchaser furnished a list of persons to whom he wished the books sent and respondent's office made the distribution; or (c) the purchaser designated in general terms the distributees, such as 15,000 libraries, or 15,000 editors, and respondent's office made the distribution to a list in the designated category in its files. (R. 196).

In the course of its investigation, the Buchanan Committee served upon respondent two subpoenas containing a list of twenty-six items concerning which the Committee desired information. The twenty-sixth item in these subpoenas called for the names of all purchasers of books or pamphlets. *The respondent gave the investigators unlimited access to all the C.C.G. records*

<sup>1</sup> H. R. Res. 298, 81st Congress (R. 188).

<sup>2</sup> H. R. Rep. 3024, 81st Congress, Second Session (1950).

*except the names of the purchasers of books.* Pursuant to these subpoenas the respondent appeared before the Buchanan Committee and offered to supply all information requested except the names of the purchasers of books. In addition respondent refused to answer a specific question by the Buchanan Committee which required him to furnish the name of "a woman from Toledo" who purchased 4,000 copies of a book for distribution to named teachers and clergymen in Toledo, Ohio.

The respondent refused to furnish the names of the purchasers of the books on the ground that, in demanding it, the Buchanan Committee had exceeded whatever investigatory power it had possessed and it had no constitutional power to require the names and addresses of the purchasers of books published by C.C.G. He expressly asserted that such legislative compulsion would be in violation of the provisions of the First and Fourth Amendments and an unconstitutional abridgment of the freedom of the press.

Petitioner's statement that, "No question of the First Amendment is involved" (Pet. p. 16) is a misstatement of fact and law; and a curious aspersion upon all three judges of the Court of Appeals, since both the majority and the dissenting opinions held that a construction of the First Amendment was decisive of the case. The pretense that there is no abridgment of free speech or free press by public disclosures which focus class hatreds on individuals, which embarrass persons and deter them from buying books or listening to speeches, was thoroughly discredited in the opinion of the Court of Appeals:

"To publicize or to report to the Congress the names and addresses of purchasers of books, pamphlets and periodicals is a realistic interference with the publication and sale of these writings. . . . There

can be no doubt . . . that the realistic effect of public embarrassment is a powerful interference with the free expression of views." (R. 202-203 App. 14)

The Buchanan Committee reported the respondent's refusal to furnish the names of the purchasers to the House of Representatives which passed a resolution certifying the report to the United States District Attorney for action. In this report it was stated: (supra P. 2)

"The distribution of printed material to influence legislation *indirectly by influencing public opinion* is the basic function of the Committee for Constitutional Government". (Italics ours)

The respondent was indicted for contempt of Congress. After a trial, in which the court instructed the jury as a matter of law that the names of the purchasers of the books were pertinent to the Congressional inquiry, he was convicted and sentenced to pay a fine of \$1,000 and imprisonment for six months, with execution of the prison sentence suspended and respondent placed on probation. (R. 10).

On appeal, the judgment of conviction was reversed on the grounds which can be summarized as follows:

(a) Attempts to influence public opinion on national affairs by books, pamphlets and other writings, is one of the fundamental freedoms of speech and the press and Congress has no power to abridge these freedoms unless there is a clear and present public danger; and there is not even a suggestion that the sale and distribution of the books and documents involved here "constitutes any public danger, clear or otherwise, present or otherwise." (R. 201-203, App. 12-13)

(b) The term "lobbying activities" in the House Resolution establishing the Buchanan Committee, means "lobbying in its commonly accepted sense, and did not purport to convey power to investigate efforts to influence public opinion." (R. 205, App. 17).

(c). The Buchanan Committee had no authority to demand the names of purchasers of books "since the public sale of books and documents is not 'lobbying'". (R. 205, App. 18).

(d). The pertinency of the names of the purchasers of the books published and sold by the C.C.G. was not established by the evidence in the record. (R. 200 App. 10-11).

## REASONS FOR DENYING THE WRIT

### I

#### Congress Did Not Attempt to Authorize the Buchanan Committee to Investigate Efforts to Influence Public Opinion in Regard to Federal Legislation.

The Buchanan Committee was only authorized to investigate to the following extent:

✓ "the committee is authorized to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote or retard legislation." (H. R. Res. 298, 81st Congress; R. 188).

Pursuant to its authority, the Buchanan Committee instituted an investigation of a number of organizations including the C.C.G. The respondent, the Executive Secretary of the C.C.G., made all its files and records available to the Buchanan Committee, except the names of the persons who purchased books. The respondent's refusal to furnish the names of the purchasers of the books which were published, sold and distributed by the C.C.G. is the sole basis of the indictment resulting in the case here involved. The petitioner is here claiming that the Buchanan Committee had the power to require



part upon the Buchanan Committee's alleged desire to probe into possible subterfuges in connection with the Lobbying Act, the financial records of the C.C.G. would have been relevant and material, yet *on the Government's objection the trial court excluded the financial data as immaterial.* (R. 200)

Similarly under any possible concept of "lobbying" or "subterfuge" it was "pertinent" to show what the book or books were that had been purchased, yet the Government urged and the trial court held that the books which had been offered in evidence by the respondent were inadmissible. (R. 99)

Even the majority of the Buchanan Committee in its General Interim Report to Congress admitted that the contents of the books which were excluded by the trial judge on the Government's urging when offered by respondent, were essential to a determination of the question of pertinency.

"The content of the publications concerned is, of course, important in determining whether or not the distributor may lawfully be required to disclose his source of support—either before this committee or pursuant to the Lobbying Act." (81st Congress, 2nd Session, House Report No. 3138, p. 32)

The Circuit Court of Appeals properly covered the subject when it stated:

"We turn first to that portion of the Buchanan Committee's Report which suggests that the Committee was seeking to ascertain whether subterfuges were being used to evade the Lobbying Act. It is clear to us that the point is not in the case as it was tried and as it is here. The statement of the Committee was that 'Because of the refusal \* \* \* to produce pertinent financial records, this committee was unable to determine' whether the Lobbying Act requires amendment to prevent subterfuges. But, as the case comes to us, there was no refusal to produce financial



records. Over and over again Rumely asserted before the Committee that he had given, and was willing to give, all records except the names and addresses of the purchasers of the books. No contention was made at those hearings that he refused to give anything else. Upon the trial the prosecutor did not say that anything else was refused. On the contrary, he urged a different view. He insisted, and the court sustained his view, that, so long as the names of purchasers of books were not given, financial records on contributions and loans were immaterial to the issues in the case. But they could not be immaterial if the issue was the inability of the Committee to probe subterfuges 'Because of the refusal of (Rumely) to produce pertinent financial records'. The Government did not rest this case upon that premise. The pertinency of the question which Rumely refused to answer was a contested issue upon the trial. The prosecutor's contention was that pertinency was established when it was shown that Rumely had registered as a lobbyist. Certainly, if the pertinency of the question rested even in part upon the Committee's desire to probe into possible subterfuges, the financial records would have been relevant and material. The prosecutor urged and the court held that the financial data was inadmissible.

"It is now said that contributions might be disguised by being made in the form of purchases of books. It is difficult to see how the purchase of a book at a dollar could be a contribution if it cost a dollar to produce the book. If the sales prices of the books exceeded the production costs in such amounts as to result in sizable profits, that fact would show in the financial records; the names of the purchasers would shed no light on that problem. No suggestion of this sort was made upon the trial or in the briefs before us.

"It is said that the names of the purchasers of the books were pertinent, since the Committee might wish to question those persons as to possible subterfuges. That pertinency was too remote on this record to sustain an abridgment of the freedoms of

speech and press. Subterfuges would appear, as the Committee itself evidently thought, upon examination of the financial records. Those records were not even admitted in evidence. Had they been admitted, and had they been suspected of being false, some further inquiry might have been in order.

But no such issue was raised in this case. On a record such as this, so slim a semblance of pertinency is not enough to justify inquisition violative of the First Amendment. . . . No mention of a purpose to probe disguised contributions appears in the Government's brief before us.

"The view of the Buchanan Committee, as reflected in such portions of its hearings as are before us, and that of the prosecutor, the trial court, and the Government in its brief and argument here, is that the publication of books upon national issues is indirect lobbying, that sending books and bulletins to Congressmen is direct lobbying, and that the Buchanan Committee had authority to investigate lobbying, direct and indirect. That is the controversy before us, as we see it." (R. 201 App. 9)

"Certainly, in a criminal case we cannot take judicial notice of things the defendant is alleged to have said or done, not shown or offered to be shown in evidence; in fact, no request for such notice was made either in the trial court or before us. Nor can mere conclusions of the Committee serve in the place of such evidence." (R. 209 App. 23-24)

The Circuit Court properly concluded that there was not sufficient evidence in the record here to establish that the names of the purchasers of the books were pertinent to an inquiry into "lobbying activities".

We submit that the government by its present petition is seeking to have tried in the Supreme Court a case which was not tried, but which, on the contrary, the government refused to have tried in the trial court. The petition is a confession that the conviction of the defendant cannot possibly be sustained on the issues and evidence

actually submitted to the trial jury. This is clearly demonstrated by the opinion of the Circuit Court of Appeals. Thus the government is apparently driven to a contention that the conviction should be sustained because the defendant *might* have been convicted if other issues and other evidence had been submitted to the jury. This petition for a writ based on such a contention must be as unique in the annals of this Court as it is affronting to elementary concepts of justice and fair play.

### CONCLUSION

We submit that all the questions presented in the case actually tried in the District Court and reviewed on appeal, were correctly decided by the Circuit Court of Appeals in an opinion so comprehensive and soundly reasoned that there is no call for a review by this Court. There is no conflict with any other opinion or decision to warrant a review. The petition should be denied.

Respectfully submitted,

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the production of the names of the individuals who purchased the books, because the books attempted to influence public opinion and that such attempts to influence public opinion constitute "indirect lobbying".

The Buchanan Committee was created to investigate "lobbying activities" regarding Federal legislation. Such investigation might be lawful if confined to investigation of any *illegitimate* efforts to influence legislation; but any effort to investigate wholly legitimate efforts of citizens to express their opinions as to the desirability of legislation would exceed the Constitutional powers of Congress.

In this regard the Circuit Court of Appeals held that Congress can not investigate "all activities" intended to influence, promote or retard legislation indirectly by influencing public opinion and stated: "if Congress had authorized its committee to inquire 'generally into attempts to influence public opinion upon national affairs by books, pamphlets and other writings, its authorization would have been void'. (R. 202 App. 13). This conclusion is based upon the grounds that "to attempt to influence public opinion upon national affairs by books, pamphlets and other writings, is one of the fundamental freedoms of speech and press" and that "Congress has no power to abridge these freedoms unless urgent necessities in the public interest require it to do so". (R. 201 App. 12)

The petitioner erroneously contends that the opinion below holds that there can not possibly be any valid legislation or inquiry into efforts to influence public opinion. The fact is that the opinion specifically refutes the interpretation claimed by the petitioner, and, after acknowledging that certain circumstances might create a public necessity for Congressional inquiry, the court holds:



"In the case at bar no such dangerous factors are represented to us. There is no suggestion that the publication or distribution of these books and documents constitutes any public danger, clear or otherwise, present or otherwise." (R. 203 App. 14).

The cases cited by petitioner holding that publishers and news agencies are subject to laws of various sorts have no bearing on the problem presented here. The government is claiming that Congress has the power to inquire into the sale of books because these books attempt to influence public opinion. In its opinions dealing with regulations governing publications this Court has always been careful to point out that the regulations upheld did not bear upon the freedom of the publication except to the extent that ordinary business burdens bear upon the publishing business. *Associated Press v. Labor Board*, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937); *Associated Press v. United States*, 326 U. S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946).

It is respectfully submitted that the opinion of the Circuit Court clearly and correctly sets forth the basis for its holding that Congress, without a clear showing of urgent necessities in the public interest, has no power to investigate attempts to influence public opinion upon national affairs by books, pamphlets and other writings and that, in establishing the Buchanan Committee, efforts to influence public opinion upon national affairs by books and pamphlets were not made subject to the authority given to investigate "lobbying activities".



**Requiring the Furnishing of Names of the Purchasers of Books and Pamphlets Constitutes a Clear Encroachment on the Rights Protected Under the First Amendment.**

The petitioner argues that the requiring of the respondent to furnish the names and addresses of all persons purchasing books sold by the C.C.G. "restrains no one from speaking, or writing or publishing his views in any manner", and that therefore "the disclosure called for by the Committee in no way impinges on the First Amendment right, either of the Committee for Constitutional Government, or of the purchasers of its books". (Pet. Brief P. 16).

We should not impose on this Court any lengthy dissertation on the rights protected against legislative restraint by the First Amendment to the Constitution. But since the petitioner takes so strong a position that these rights would not be violated here through the disclosure of the names of the purchasers we are under an obligation to assert them vigorously. A few quotations from the opinions of this Court should be more effective than any original argument.

In *Thomas v. Collins*, 323 U. S. 516, this court stated:

"The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place, given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Prince v. Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not

of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge v. Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760." (P. 529, 530).

In *Lovell v. Griffin*, 303 U. S. 444, this court held that book publishers are included in the freedoms protected by the Constitution when it stated:

"The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota*, supra; *Grosjean v. American Press Co.*, supra; *DeJonge v. Oregon*, supra." (P. 452)

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, the opinion of this Court stated principles, as to which we can assume there was and will be no dissent, in holding:

"The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But *freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.*" (P. 639) - (Italics ours)

The invalidity of any attempt by the Congress to regulate the publication, distribution and purchase of concededly lawful printed material is so plain that an investigation by a committee "in aid of (such) legislating" cannot possibly be held to be a valid exercise of congressional power and the Court below correctly so held.

The petitioner argues that the inquiry does not involve private views as such but only seeks information as to how those private views were disseminated and that public disclosure of such information would restrain no one from publishing his views. In this connection the Circuit Court of Appeals stated:

"To publicize or to report to the Congress the names and addresses of purchasers of books, pamphlets and periodicals is a realistic interference with the publication and sale of those writings. This is another problem which we examined in the *Barsky* case, *supra*, and we there held that the public inquiry there involved was an impingement upon free speech. We are of the same view here. There can be no doubt, in that case or in this one, that the realistic effect of public embarrassment is a powerful interference with the free expression of views. In that case the tenets of Communism and the apparent

nature of the Communist Party created a public necessity for congressional inquiry. In the case at bar no such dangerous factors are represented to us. There is no suggestion that the publication or distribution of these books and documents constitutes any public danger, clear or otherwise, present or otherwise." (R. 202-203 App. 14).

The inquiries of the Buchanan Committee were of the character that would undoubtedly injure a publisher's business and scare away his prospective customers. No court can be respectfully asked to ignore these realities. Blind justice may be tolerable but not blind judges. "We may not shut our eyes to any facts of common knowledge". *Louisville Trust Co. v. Louisville N. A. & C. R. Co.*, 174 U. S. 674, 683. "To do this would be to shut our eyes to what all others see and understand". *U. S. v. Butler*, 297 U. S. 1, 61.

The "lady from Toledo" purchased 4000 copies of *The Road Ahead* to be sent to persons in her home town whose social, economic, moral or political opinions she thought it might influence. Surely she had a constitutional freedom to do this. But, if she had known that her name and address must be reported to Congress and would be sensationally publicized by a committee of Congress she might well have been deterred from making such a purchase.

Even more obvious would be the legislative restraint on large employers to deter them from buying the book published by the C.C.G. entitled *Why the Taft-Hartley Law?* Many an employer, seeking to counteract the notorious propaganda of all major labor organizations against this Act, and to enlighten public opinion as to its merits, would be normally inclined to purchase quantities of these books for distribution. But the enforced publicity of such purchases under the Buchanan Committee investigation would inevitably deter many such employers



from thus arousing antagonisms that would surely embarrass their efforts to maintain cordial relations with their employees and union organizations.

The restraints involved, in the public disclosure of the names and addresses of the purchasers of the books of the C.C.G. in a Congressional hearing investigating "Lobbying Activities", are obvious and substantial. There is no more serious violation of the rights of the American people than a legislative restraint in expressing and propagating their economic, social, moral or political opinions by speaking, printing and distributing them, and in thereby seeking legitimately to influence public opinion. These rights admit of no restriction or embarrassment directly or indirectly by legislative action of any character, no matter how apparently innocuous nor how plausibly justified.

As this Court stated in *Thomas v. Collins*, (Supra):

"The restraint is not small when it is considered what was restrained. \* \* \* If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty." (543)

### III

**There Is No Evidence in the Record to Support a Ruling That the Names of Purchasers of Books Published by Respondent's Employer Were Pertinent to the Buchanan Inquiry Into Lobbying Activities.**

The Government for the first time now takes the untenable position that a person purchasing books from the C.C.G. was supporting the C.C.G. and therefore the names of the purchasers were pertinent to the inquiry



into "lobbying activities" because the Buchanan Committee in its report to Congress had stated that they were unable to determine whether the C.C.G. was resorting to subterfuges because the C.C.G. had failed to produce "pertinent financial records".

The record clearly establishes and the Government admits that all of the financial records were produced or made available to the Buchanan Committee by respondent except for the names of the purchasers. (R. 200, App. 9-10) The pertinency of the names of the purchasers which the respondent refused to produce was the contested issue upon the trial of this criminal case.

The Government urged at both the trial and before the Circuit Court that pertinency in this case was established solely by the fact that respondent had registered under the Federal Lobbying Act, even though under protest. (R. 200).

The prosecution in a criminal case has the burden of not only pleading but proving all the essential elements of the crime charged; *Sinclair v. U. S.* 279 U.S. 263, yet the fact of registration *under protest* is the *only* evidence in the record and properly before this Court as to pertinency.

The trial judge specifically instructed the jury that—  
 "The nature of the activities of the defendant, or of the organization with which he was connected is not an issue in this case. It is your duty to disregard any speculation on the subject." (R. 176)

In the face of this charge the government *now* asks the Supreme Court to review this case and to hold that the defendant should have been convicted because he engaged in an activity which the trial court did not permit him to deny—but held to be not an issue in the case.

Certainly if pertinency of the names of the purchasers depended (as now urged by the Government) even in

addresses of the purchasers of the books. No contention was made at those hearings that he refused to give anything else. Upon the trial the prosecutor did not say that anything else was refused. On the contrary, he urged a different view. He insisted, and the court sustained his view, that, so long as the names of purchasers of books were not given, financial records on contributions and loans were immaterial to the issues in the case. But they could not be immaterial if the issue was the inability of the Committee to probe subterfuges "Because of the refusal of [Rumely] to produce pertinent financial records". The Government did not rest this case upon that premise. The pertinency of the question which Rumely refused to answer was a contested issue upon the trial. The prosecutor's contention was that pertinency was established when it was shown that Rumely had registered as a lobbyist. Certainly, if the pertinency of the question rested even in part upon the Committee's desire to probe into possible subterfuges, the financial records would have been relevant and material. The prosecutor urged and the court held that the financial data was inadmissible.

It is now said that contributions might be disguised by being made in the form of purchases of books. It is difficult to see how the purchase of a book at a dollar could be a contribution if it cost a dollar to produce the book. If the sales prices of the books exceeded the production costs in such amounts as to result in sizable profits, that fact would show in the financial records; the names of the purchasers would shed no light on that problem. No suggestion of this sort was made upon the trial or in the briefs before us.

It is said that the names of the purchasers of the books were pertinent, since the Committee might wish to question those persons as to possible subterfuges. That pertinency was too remote on this record to sustain an

abridgment of the freedoms of speech and press. Subterfuges would appear, as the Committee itself evidently thought, upon examination of the financial records. Those records were not even admitted in evidence. Had they been admitted, and had they been suspected of being false, some further inquiry might have been in order. But no such issue was raised in this case. On a record such as this, so slim a semblance of pertinency is not enough to justify inquisition violative of the First Amendment. We are also of opinion that, even if the purchases were really contributions but were merely in furtherance of an effort to influence public opinion, they were beyond the power of the Congress and of the Committee under its Resolution, a subject which we shall discuss in a moment. No mention of a purpose to probe disguised contributions appears in the Government's brief before us.

The view of the Buchanan Committee, as reflected in such portions of its hearings as are before us, and that of the prosecutor, the trial court, and the Government in its brief and argument here, is that the publication of books upon national issues is indirect lobbying, that sending books and bulletins to Congressmen is direct lobbying, and that the Buchanan Committee had authority to investigate lobbying, direct and indirect. That is the controversy before us, as we see it.

Appellant presents two principal contentions. He insists that the Buchanan Committee had no power to require him to produce or to reveal the names of purchasers of books, on two grounds, (1) that the Congress had no constitutional power to make that inquiry and (2) that the House had not by its Resolution empowered the Committee to make that inquiry. Both contentions were available to him.<sup>5</sup>

<sup>5</sup> *McGrain v. Daugherty*, 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319 (1927).

APPENDIX

United States Court of Appeals

FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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No. 11,066

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EDWARD A. RUMELY, APPELLANT

V.

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court  
for the District of Columbia

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Decided April 29, 1952

*Mr. Donald R. Richberg*, with whom *Messrs. Alfons Landa* and *Delmar W. Holloman* were on brief, for appellant.

*Mr. William Hitz*, Assistant United States Attorney, with whom *Mr. Charles M. Ireland*, United States Attorney at the time the brief was filed, was on the brief, for appellee. *Mr. George Morris Fay*, United States Attorney at the time the record was filed, and *Mr. Joseph M. Howard*, Assistant United States Attorney, also entered appearances for appellee.

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges.

PRETTYMAN, Circuit Judge: This is an appeal from a

judgment of conviction upon three counts of an indictment. The three counts read, in pertinent part, as follows:

*Count One*

"Defendant Edward A. Rumely, by subpoena served upon him on May 26, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (1) the name and address of each person from whom a total of \$1,000 or more has been received by the Committee during the period, January 1, 1947, to May 1, 1950, for any purpose, including, but not limited to (a) receipts from the sale of books, pamphlets, and other literature, (b) contributions, (c) loans; (2) as to each such person the amount, date, and purpose of each payment which formed a part of the total of \$1,000 or more. Defendant Rumely appeared before the said Committee on June 6, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default."

*Count Six*

"Defendant Edward A. Rumely, by subpoena served upon him on August 21, 1950, was summoned as a witness by the authority of the House of Representatives of the Congress of the United States, through its Select Committee on Lobbying Activities, to produce before the said Committee records upon the matter under inquiry before the said Committee, that is, to produce the records of the Committee for Constitutional Government, Inc., showing (a) the name and address of each person from whom a total of \$500 or more has been received by the said Committee during the period from January



1, 1947, to August 1, 1950, for any purpose, and (b) as to each such person, the amount, date and purpose of each payment which formed a part of the total of \$500 or more, and all correspondence relating to each such payment. Defendant Rumely appeared before the said Committee on August 25, 1950, in the District of Columbia, but failed and refused to produce the said records, and thereby wilfully did make default."

### *Count Seven*

"Defendant Edward A. Rumely appeared as a witness before the said Committee at the place and on the date above stated and refused to answer a question put to him by the Committee, namely, who was the woman from Toledo who gave him \$2000 for distribution of 'The Road Ahead,' which question was a question pertinent to the question under inquiry."

The offenses thus charged were alleged to be violation of the statute which reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."<sup>1</sup>

The Select Committee on Lobbying Activities, generally known as the Select Committee or the Buchanan Committee, was created on August 12, 1949, by the House

<sup>1</sup> 52 STAT. 942 (1938), 2 U. S. C. A. § 192.

of Representatives of the United States by a Resolution<sup>2</sup> which, in pertinent part, reads as follows:

"The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

Appellant is the Executive Secretary of an organization known as the Committee for Constitutional Government, Inc., incorporated in 1941 as a successor to an unincorporated Committee formed in 1937. Under instructions of the Committee's trustees he filed in 1946 with the Clerk of the House of Representatives a report, pursuant to the Regulation of Lobbying Act,<sup>3</sup> accompanied by a letter, and thereafter until early 1951 he filed similar reports and letters. One of these letters, in language like that of the others, read in part:

"I am not employed to support or oppose any legislation whatsoever. For this reason and the reasons set forth in my letters to you under previous dates, I protest that I am not under any legal obligation to file reports under said Act, and again request ruling on this question for future guidance."

The Committee for Constitutional Government, Inc., publishes and distributes books and pamphlets, usually pertaining to national affairs and issues. The Report of the Buchanan Committee to the House<sup>4</sup> indicates that the

<sup>2</sup> H. R. RES. 298, 81st Cong., 1st. Sess.

<sup>3</sup> 60 STAT. 839 (1946), 2 U. S. C. A. § § 261-270.

<sup>4</sup> H. R. REP. No. 3024, 81st Cong., 2d Sess. (1950). The transcript of the hearings before the Buchanan Committee is not in this record, except in so far as excerpts were included in the Report to the House (Gov't Ex. 4) or read to the jury. H. R. REP. No. 3239, another report of the Buchanan Committee, is not in this record.

concern distributed, among other things, some 750,000 copies of "The Road Ahead", a book by John T. Flynn, 250,000 copies of "Labor Monopolies and Freedom", a book by John W. Scoville, 130,000 copies of "Compulsory Medical Care and the Welfare State" by Melchior Palyi, about 600,000 copies of the "Constitution of the United States" by Thomas James Norton, thousands of "Why the Taft-Hartley Law" by Irving G. McCann, and millions of engrossed copies of the Bill of Rights to schools and colleges. Rumely testified before the Committee that about 85 per cent of the books were sold in lots of from one to twenty copies and the remainder in bulk sales. Bulk sales took three forms: (1) The purchaser bought the books and distributed them; (2) the purchaser furnished a list of people to whom he wished the books sent, and Rumely's office made the distribution; (3) the purchaser designated in general terms the distributees, such, for example, as 15,000 libraries or 15,000 editors, and Rumely's office made the distribution to a list of names in that category in its files.

Rumely testified, according to the Report of the Committee, that he and his associates do not come down to Congress, that "Our lobbying consists of going out with a viewpoint to the country, and informing people and letting the people talk to their Members of the Congress." Upon occasion copies of a book or pamphlet are distributed to all members of Congress. For example, Rumely said that a purchaser of "Labor Monopolies or Freedom" directed distribution to "every newspaperman" in the United States and also to all Congressmen. The record before us contains no contradiction of that testimony or any different description of the activities of the organization.

In the course of its investigations the Buchanan Committee served upon appellant two subpoenas, one on May 26, 1950, and the other on August 21, 1950. The nature

and extent of the subpoenas are indicated in the first and sixth counts of the indictment, quoted in pertinent part above. Sometime in May investigators for the Buchanan Committee appeared at Rumely's office and submitted to him a list of material, in twenty-six items, concerning which the Buchanan Committee desired information. The twenty-sixth item called for the names of all purchasers of books or pamphlets. After some discussion Rumely gave the investigators access to all records, etc., for all purposes except the twenty-sixth item. Pursuant to the first subpoena Rumely appeared before the Committee on June 6, 27, 28 and 29, 1950. On June 28th Rumely told the Committee, "I am perfectly willing to give everything except one thing. I haven't withheld anything, except the names of the buyers of our books. Those, you can't have." He repeated many times in the course of those hearings that he declined to give any names of people who bought books from his company. On June 29th he told the Committee:

"I certainly refuse to disclose those names—not contemptuously, but respectfully, because I feel it is my duty to uphold the fundamental principles of the Bill of Rights. I think that there is no power to require of a publisher the names of the people who buy his products, and that you are exceeding your right."

The August 21st subpoena, reflected in Count Six of the indictment, called for more material than did the May 26th one, and it required Rumely to appear on August 25th. He appeared and stated that he had brought the material "As far as it was physically possible." He insisted that full compliance was "an impossible thing." He stated, for example, that the investigator had asked for each of the returned checks drawn on the National City Bank in 37 months, that he had put four men to work on that item, and that in 43½ hours they had been able to assemble the checks for only one month. On this



appearance Rumely repeated his refusal to give the names of the purchasers of books.

Concerning the transaction which was the basis for Count Seven of the indictment, Rumely testified both before the Buchanan Committee and upon the trial that his Committee had outstanding a general offer to sell copies of the book "The Road Ahead" in bulk at fifty cents a copy. A "woman from Toledo" sent a check for \$2,000 and requested that 4,000 copies of the book be distributed to school teachers and clergymen in Toledo, as shown on a list which she furnished. Rumely refused to tell the Buchanan Committee the name of this woman.

In its Report to the House the Buchanan Committee said:

"Our study of this organization indicates very clearly that its most important function is the distribution of books and pamphlets in order to influence legislation directly and indirectly. It attempts to influence legislation directly by sending copies of books, pamphlets, and other printed materials to Members of Congress. It attempts to influence legislation indirectly by distributing hundreds of thousands of copies of these printed materials to people throughout the United States.

"The distribution of printed material to influence legislation indirectly by influencing public opinion is the basic function of the Committee for Constitutional Government. . . ."

And again the Committee said:

"These leaflets and memoranda, coupled with the books themselves, are evidence that their distribution by the Committee for Constitutional Government, Inc., constitutes an attempt by that organization to influence legislation, directly or indirectly."



The following colloquy occurred between Rumely and counsel for the Committee and typifies the nature of the hearing:

"MR. RUMELY. The Road Ahead, I have told you all along, we put out 600,000. I am not going to give you the names of the people who bought it.

"MR. FITZGERALD. Don't you feel The Road Ahead deals with specific legislation?

"MR. RUMELY. The Road Ahead deals with stopping the march into socialism and the destruction of our form of government.

"MR. FITZGERALD. I think that the true significance of the Road Ahead can be obtained only by reading it in its entirety, and I respectfully suggest that the committee read it. It condemns practically all of the social legislation which has been passed by the Roosevelt and Truman administrations, and opposes practically all of the present legislative program of President Truman. However, it does deal with specific legislation from time to time.

"For example, it deals with the war powers. On page 158 it states: 'We must curb the grasping hand of the Federal Government. We must restrain the grasping hand of the Executive. And our very first step must be to make a list of the emergency powers granted to the Executive for war purposes and then repeal every one of them.'

In its Report the Committee also suggested that refusal to submit pertinent financial records might cover subterfuges to evade the Federal Regulation of Lobbying Act, i.e., to mask contributions as purchases. We shall discuss that suggestion in a moment.

The trial of Rumely was a comparatively simple proceeding. The prosecutor presented evidence that Rumely had registered under the Lobbying Act, that the Committee had been created by Resolution, and that the subpoenas had been served. He verified certain extracts (from pages 17, 18, 19, 20, 126, 166, 271, 272 and 273) from the transcript of the Committee hearings, which

showed that Rumely refused to give the names and addresses of purchasers of books. He presented a certified copy of the Report of the Committee to the House. The defense presented Rumely and four character witnesses. Rumely described his efforts to comply with the subpoenas and verified his refusal to give the names of the purchasers of the books. Counsel for the defense made a detailed and extensive proffer of evidence, which was excluded from the jury by the court but accepted in part for the court itself on the question of pertinency. On cross examination Rumely asserted some half dozen times that he refused to give the names of purchasers of books.

The theory of the prosecution, adopted as correct by the court, was that, so long as Rumely refused to give a part of the subpoenaed data, all else was immaterial. The court instructed the jury that the Buchanan Committee was validly constituted and had jurisdiction over the matters under consideration; that the records subpoenaed were pertinent; that the Committee had a reasonable basis for issuing the subpoenas; that the subpoenas were validly issued; and that it made no difference what records were supplied so long as some were not supplied.

We turn first to that portion of the Buchanan Committee's Report which suggests that the Committee was seeking to ascertain whether subterfuge were being used to evade the Lobbying Act. It is clear to us that the point is not in the case as it was tried and as it is here. The statement of the Committee was that "Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine" whether the Lobbying Act requires amendment to prevent subterfuges. But, as the case comes to us, there was no refusal to produce financial records. Over and over again Rumely asserted before the Committee that he had given, and was willing to give, all records except the names and

We begin this consideration with basic premises. To attempt to influence public opinion upon national affairs by books, pamphlets and other writings is one of the fundamental freedoms of speech and press. Congress has no power to abridge those freedoms unless urgent necessities in the public interest require it to do so. We examined this matter at length in *Barsky v. United States*.<sup>6</sup> In that case it was shown that the President and other responsible Government officials had, with supporting evidentiary data, represented to the Congress that Communism and the Communists are, in the current world situation, potentials threats to the security of this country. For that reason, and for that reason alone, we held that Congress had the power, and a duty, to inquire into Communism and the Communists.<sup>7</sup> The doctrine has since been clarified and sharpened by the Supreme Court.<sup>8</sup> At the same time, the Supreme Court by numerous expressions, both before and after the *Barsky* decision, has

<sup>6</sup> 83 U. S. App. D. C. 127, 167 F. 2d 241 (1948), *cert. denied*, 334 U. S. 843, 92 L. Ed. 1767, 68 S. Ct. 1511 (1948).

<sup>7</sup> The decisions of this court in *Dennis v. United States*, 84 U. S. App. D. C. 31, 171 F. 2d 986 (1948), *aff'd*, 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519 (1950); *Lawson v. United States*, 85 U. S. App. D. C. 167, 176 F. 2d 49 (1949), *cert. denied*, 339 U. S. 934, 94 L. Ed. 1352, 70 S. Ct. 663 (1950); *Morford v. United States*, 85 U. S. App. D. C. 172, 176 F. 2d 54 (1949), *rev'd on other grounds*, 339 U. S. 258, 94 L. Ed. 815, 70 S. Ct. 586 (1950), 87 U. S. App. D. C. 256, 184 F. 2d 864 (1950), *cert. denied*, 340 U. S. 878, 95 L. Ed. 638, 71 S. Ct. 120 (1950); and *Marshall v. United States*, 85 U. S. App. D. C. 184, 176 F. 2d 473 (1949), *cert. denied*, 339 U. S. 933, 94 L. Ed. 1352, 70 S. Ct. 663 (1950), rested upon the same necessities of national security.

<sup>8</sup> Compare *Dennis v. United States*, 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857 (1951), *Communications Ass'n v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674 (1950), and *Adler v. Board of Education*, 342 U. S. 485 (1952), with *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943).

made clear the inviolability of the fundamental freedoms in the absence of some such public necessity.<sup>9</sup>

That Congress has no power in respect to efforts to influence public opinion rests upon two bases. First, Congress is a representative body. It represents the people, and its power comes from the people. It is not a source or a generator of power; it is a recipient and user of power. As a representative it has no inherent authority to interfere with the thought or wishes of its principal, and the people have not conferred that authority upon their representative, the Congress. So that, even if there were no prohibition such as the First Amendment in the Constitution, Congress would lack authority to abridge either public opinion or efforts to influence that opinion. Second, the First Amendment is a direct prohibition upon the Congress. It reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Congress cannot legislate concerning "all activities intended to influence, encourage, promote, or retard legislation"; or activities designed, in the language of the Buchanan Committee, "to influence legislation indirectly by influencing public opinion". If Congress had authorized its Committee to inquire generally into attempts to influence public opinion upon national affairs by books, pamphlets, and other writings, its authorization would have been void.

<sup>9</sup> *Stromberg v. California*, 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931); *Near v. Minnesota*, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936); *De Jonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937); *Schneider v. State*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146 (1939); *Nienmoko v. Maryland*, 340 U. S. 268, 95 L. Ed. 267, 71 S. Ct. 325 (1951), and *Kunz v. New York*, 340 U. S. 290, 95 L. Ed. 280, 71 S. Ct. 312 (1951), and cases cited therein.



To publicize or to report to the Congress the names and addresses of purchasers of books, pamphlets and periodicals is a realistic interference with the publication and sale of those writings. This is another problem which we examined in the *Barsky* case, *supra*, and we there held that the public inquiry there involved was an impingement upon free speech. We are of the same view here. There can be no doubt, in that case or in this one, that the realistic effect of public embarrassment is a powerful interference with the free expression of views. In that case the tenets of Communism and the apparent nature of the Communist Party created a public necessity for congressional inquiry. In the case at bar no such dangerous factors are represented to us. There is no suggestion that the publication or distribution of these books and documents constitutes any public danger, clear or otherwise, present or otherwise.

In support of the power of Congress it is argued that lobbying is within the regulatory power of Congress; that influence upon public opinion is indirect lobbying, since public opinion affects legislation; and that therefore attempts to influence public opinion are subject to regulation by the Congress. Lobbying, properly defined, is subject to control by the Congress, a matter we shall discuss in a moment. But the term cannot be expanded by mere definition so as to include forbidden subjects. Neither semantics nor syllogisms can break down the barrier which protects the freedom of people to attempt to influence other people by books and other public writings. Such logic as the contention possesses falls before the realities of the protected freedoms.

It is said that lobbying itself is an evil and a danger. We agree that lobbying by personal contact may be an evil and a potential danger to the best in legislative processes. It is said that indirect lobbying by the pressure of public opinion on the Congress is an evil and a



danger. That is not an evil; it is a good, the healthy essence of the democratic process. It is said that the financing of extensive efforts to influence public opinion is an evil and a danger. As to that, generalities are inaccurate. If influences upon public opinion were being bought and prostituted, an evil might arise. But the case before us concerns the public distribution of books and the formation of public opinion through the processes of information and persuasion. There is no evil or danger in that process. To fail to recognize the difference between that which threatens the national security and that which is, or may be, merely evil is to fail to recognize realities.

With these considerations in mind we turn to the House Resolution which was the authority of the Buchanan Committee. The House of Representatives did not purport to confer upon the Buchanan Committee power to investigate all activities intended to influence, encourage, promote or retard legislation. The Resolution of authority limited the Committee's inquiries to "lobbying" activities. "Lobbying" is a word of common meaning. The verb "lobby" means, according to the Oxford English Dictionary (1933), "To influence (members of a house of legislature) in the exercise of their legislative functions by frequenting the lobby. Also, to procure the passing of (a measure) *through* Congress by means of such influence." Other dictionaries give similar meanings. The Supreme Court discussed a contract for "lobby service" in *Trist v. Child*<sup>10</sup> and used the term "personal solicitation" as descriptive of it. "A lobbyist", said the Circuit Court in *Burke v. Wood*,<sup>11</sup> "is defined to be one who frequents the lobby or the precincts of a Legislature or other deliberative assembly with the view of influencing

<sup>10</sup> 21 Wall (88 U. S.) 441, 22 L. Ed. 623 (1875).

<sup>11</sup> 162 Fed. 533, 537 (S. D. Ala. 1908).

the views of its members." In the past a difference between lobbying and "purely professional services" in acquainting a legislature with the merits or demerits of measures was recognized at the law. The Supreme Court discussed it in *Trist v. Child, supra*, and in *Marshall v. Baltimore & Ohio R. R.*,<sup>12</sup> both of which cases it discussed in *Oscanyan v. W. R. Arms Co.*<sup>13</sup> Similar discussion appears in *Lucas v. Wofford*,<sup>14</sup> *Ewing v. National Airport Corporation*,<sup>15</sup> and *Noonan v. Gilbert*.<sup>16</sup> It may be that the line between lobbying in its pristine sense and proper professional service is too shadowy to serve as a limiting barrier to the regulatory power of the Congress. We do not have that question here, and, however that may be, Congress was certainly aware of the common meaning of the words "lobbying activities" when it used them in conferring authority upon the Buchanan Committee. At the most, the words depict no more than representations made directly to the Congress, its members, or its committees.

Lobbying, as thus or similarly defined, is within the regulatory power of the Congress and the terms of the Resolution. The influencing of legislative processes by contacts with legislators is potentially, although by no means necessarily or universally, a danger to the free and proper exercise of the legislators' functions. As such it is subject to inquiry by the legislature and to protective restrictions. Congress has a duty to protect the free flow from the people of influence, encouragement, promotion and retardation of legislative matters. So Congress

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<sup>12</sup> 16 How. (57 U. S.) 314, 14 L. Ed. 953 (1853).

<sup>13</sup> 103 U. S. 261, 26 L. Ed. 539 (1881).

<sup>14</sup> 49 F. 2d 1027 (5th Cir. 1931).

<sup>15</sup> 115 F. 2d 859. (4th Cir. 1940), *cert. denied*, 312 U. S. 705, 85 L. Ed. 1138, 61 S. Ct. 828 (1941).

<sup>16</sup> 63 App. D. C. 30, 68 F. 2d 775 (1934).

has the right to restrict "lobbying" as properly defined, since such lobbying may, unless controlled, impede the effectual exercise of the people's power. But Congress has no authority to impede the exercise of those functions of and by the people.

There is some justification for the argument, that the House intended the words "lobbying activities" in its Resolution to encompass the full scope of the Regulation of Lobbying Act.<sup>17</sup> The terms of that Act apply to any person who receives money to be used for either of two purposes, the second purpose being "To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States."<sup>18</sup> We do not have before us in this case either the meaning or the validity of the Lobbying Act and so are neither called upon nor empowered to decide those questions as such. A three-judge statutory court in this jurisdiction, composed of Circuit Judge Wilbur K. Miller and District Judges Schweinhaut and Holtzoff, has unanimously declared Sections 303 to 307 of the Lobbying Act to be unconstitutional.<sup>19</sup> We have already said enough to indicate that at least a serious constitutional question would arise if the House Resolution were to be interpreted to include the broad powers claimed for it by the Committee. The Resolution should be interpreted to avoid that doubt.

We are of opinion that the term "lobbying activities" in the House Resolution must be held to mean lobbying in its commonly accepted sense, and did not purport to convey power to investigate efforts to influence public opinion.

<sup>17</sup> *Supra* note 3.

<sup>18</sup> Sec. 307(b) of the Act, 60 STAT. 841, 2 U. S. C. A. § 266(b).

<sup>19</sup> National Association of Manufacturers, et al. v. McGrath, Civil No. 381-48, March 17, 1952.

We are of opinion that the demand made upon appellant for the names of purchasers of books from his concern was outside the terms of the authority of the Buchanan Committee, since the public sale of books and documents is not "lobbying".

It may or may not be that, if members of the Congress were receiving gratuitously and anonymously copies of books or documents dealing with matters pending before them but also circulated generally in the public market, the Congress would be entitled to inquire as to the identity of the donors. The question presented by such a situation might be a difficult one, but the controversy before us is not drawn along those lines. Had Rumely been asked merely for the names of persons who anonymously financed the presentation of books or pamphlets to members of Congress, a different problem would be here. But he was not asked that question; he was asked and refused to give all the names of purchasers of books in amounts of \$500 or more.

In this connection we are inclined to observe further that anonymous donations of printed material to Congressmen appear to be a danger too insignificant to support abridgment of freedoms of speech, press and religion. Members of Congress need read only that which they want to read. The force behind the writing is the author, not the donor. And, moreover, the wastebasket is an invincible protector against harm by such means. "Lobbying" by personal contact is a different and more dangerous activity.

It is clear that authority over a subject matter does not import authority over all activities of persons concerned in that subject matter. Especially is it true that power over a subject matter involving speech, press, religion, assembly and petition does not go beyond the power to do that which is essential to be done in pro-



tection against a public danger. Many lawyers, businessmen, and others are required, and properly, to be in contact with legislators concerning legislation. And so they may be subject to regulation and open to inquiry concerning that activity. But the power of inquiry which arises from that reason does not strip from all other activities of those persons the rights which inhere in them and which are protected in terms by the First Amendment.

The scope of the power of legislatures to compel testimony in the course of investigation has been the subject more of comment by legal writers<sup>20</sup> than of interpretation by federal courts.<sup>21</sup> The Supreme Court had no occasion to consider the existence of such power until 1881, in *Kilbourn v. Thompson*,<sup>22</sup> and then the decision rested upon the view that the inquiry was not in aid of any law-making function, the Court expressly reserving the question whether the power to inquire existed. Meanwhile, however, two well-considered state court opinions were rendered: one a Massachusetts case, *Burnham v.*

<sup>20</sup> See, e.g., Dimock, *Congressional Investigating Committees*, 47 JOHNS HOPKINS UNIV. STUDIES IN HIST. AND POLITICAL SCIENCE No. 1 (1929); EBERLING, *CONGRESSIONAL INVESTIGATIONS* (1928); 1 WIGMORE, *EVIDENCE* § 4k (3d ed. 1940); 8 *id.* § 2195; Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); Hamilton, *The Inquisitorial Power of Congress*, 23 A.B.A.J. 511 (1937); Cousens, *The Purposes and Scope of Investigations Under Legislative Authority*, 26 GEO. L. J. 905 (1938); Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 COL. L. REV. 1 (1933); Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. OF PA. L. REV. 691, 780 (1926); 40 GEO. L. J. 137 (1951).

<sup>21</sup> Cases involving the question come before the courts in a variety of ways: in prosecutions under 2 U. S. C. A. § 192, as here; in *habeas corpus* proceedings; in tort actions for false imprisonment.

<sup>22</sup> 103 U. S. 168, 26 L. Ed. 377.



*Morrissey*,<sup>23</sup> in which on the facts of the case, the assertion of the existence of the power may be said to be *dictum*; and the other a New York case, *Keeler v. McDonald*,<sup>24</sup> in which the decision rested squarely upon the existence of the power. Both of those cases and other state cases were considered by the Supreme Court when in 1927 it was faced with the question in *McGrain v. Daugherty*.<sup>25</sup> They were adopted as the rationale of that decision. The principles developed in the foregoing cases were matured in *Sinclair v. United States*.<sup>26</sup> Explicit in that decision is recognition of "the purpose of the courts well to uphold the right of privacy".<sup>27</sup> The Court, illustrating its concern in that respect, referred to cases<sup>28</sup> involving the power of Congress-created agencies to examine into private affairs, and quoted approvingly from a number of those opinions to show its care lest governmental inquiries abridge fundamental freedoms. The gist of the decision in the *Sinclair* case was that, since Congress had plenary power over federal property, it could ask questions about naval oil reserves.

Of course the publishers of books are not immune from law. This is the purport of the cases holding publishers

<sup>23</sup> 14 Gray 226 (1859).

<sup>24</sup> 99 N. Y. 463, 2 N. E. 615 (1885).

<sup>25</sup> 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319.

<sup>26</sup> 279 U. S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929).

<sup>27</sup> *Id.* at 292.

<sup>28</sup> *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 S. Ct. 1125 (1894); *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115 (1908); *United States v. Louisville & N. R. R.*, 236 U. S. 318, 59 L. Ed. 598, 35 S. Ct. 363 (1915); *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 68 L. Ed. 696, 44 S. Ct. 336 (1924); *In re Pacific Ry. Comm'n* 32 Fed. 241 (C. C. N. D. Cal. (1887)).

and news agencies subject to laws of various sorts.<sup>29</sup> That is not the problem before us. Here the power claimed by the Committee is a power to inquire into the sale of books because those books attempt to influence public opinion. In its opinions dealing with regulations imposed upon the press,<sup>30</sup> the Supreme Court has been most careful to point out that the regulations upheld did not bear upon the freedom of publication except to the extent that ordinary business burdens bear upon the publishing business.

Our attention is directed in alarm to the vast operations of Rumely's organization. We are referred to "indirect lobbying techniques" and to modern methods of lobbying. We are told that modern media for mass communication have made established concepts of lobbying archaic. We are told that there ~~should~~ be a reference source where full material concerning those who would influence public opinion could be had, and that organized groups who attempt to influence public opinion must be dealt with by Congress. None of these flourishes withstands scrutiny. Rumely's vast operations turn out to be the quantities of books and pamphlets which his organization distributes to the public. What is called a new lobbying technique turns out to be aroused public opinion. The new features are new mechanics of communication and new mass interest in the minutiae of congressional activities. But speech and press by these new means—on the radio, on television, and in the movies—are freedoms protected by the First Amendment. And the public policy which prohibits any current con-

<sup>29</sup> Associated Press v. Labor Board, 301 U. S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937); Associated Press v. United States, 326 U. S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946).

<sup>30</sup> *E.g.*, cases cited *ibid.*

gressional membership from abridging the impact of public opinion upon the Congress is as sound today as it was when it was first formulated. If it be true that those who today would influence legislation turn from the buttonholes of the legislators to the forum of public opinion for support, a great good in the cause of representative government has been done. The evil to be dealt with is at the buttonhole, not in the arena of public discussion, whether that discussion be oral or written, over the air or on printed pages. These are basic principles of our concept of government. If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of those principles, we will have lost parts of the foundation of the Constitution.

The Government says that pertinency in this case was sufficiently shown by the fact that appellant had registered under the Federal Lobbying Act, even though under protest. The claim is startlingly broad. If valid, it would mean that all the affairs of any person who represented another in respect of legislation would be open to inquiry. But, as we have indicated, "pertinency", as used to describe a requisite for valid congressional inquiry, means pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation. Moreover, this appellant registered under protest. Surely those cautious souls who register rather than risk the severe penalties of the Lobbying Act do not by that mechanical act waive all rights protected by the First and Fourth Amendments. We think this position of the Government not tenable.

The Government cites cases under Federal Corrupt Practices Act. That subject must be considered in the

light of the opinions in *United States v. C.I.O.*<sup>31</sup> We need not here repeat or attempt to summarize those opinions. They are pertinent in full text to this contention of the Government.

It is our view that the Resolution of the House which created the Buchanan Committee, and gave it power to investigate "lobbying activities" did not confer the power which the Committee claimed in its demand upon appellant and which the Government upon this appeal claims for it, relating to the identity of the purchasers of books from his company. Appellant Rumely was within his rights when he refused to supply the information involved in the trial upon the indictment.

We think our dissenting judge discusses a case which is not before us—issues not presented in the trial court or here, and facts not in evidence in this record. The transcript of the hearings and the exhibits, including letters, etc., before the Buchanan Committee was neither offered nor admitted in evidence, except in so far as portions were reproduced in the Report to the House and in so far as a few excerpts were read to the jury. The agreement between counsel at the opening of the trial that the transcript was a correct transcript and that neither the reporter nor his shorthand notes need be resorted to, was no substitute for the presentation of evidence, and it did not purport to be. When the prosecutor wanted a portion of the hearings in evidence he said so. Thus he said, "... I should like to offer so much of it in evidence as is contained on pages 17, 18, 19 and a third of the way down on page 20, and read it to the jury at this time." And again he said, "At this time, Your Honor, I would like to offer in evidence almost a complete page of testimony of the hearings commencing on page 271." Certainly, in a criminal case we cannot

<sup>31</sup> 335 U. S. 106, 92 L. Ed. 1849, 68 S. Ct. 1349 (1948).

take judicial notice of things the defendant is alleged to have said or done, not shown or offered to be shown in evidence; in fact, no request for such notice was made either in the trial court or before us. Nor can mere conclusions of the Committee serve in the place of such evidence. We repeat that the controversy before us is whether the sale of a book, such, for example, as "The Road Ahead", is "indirect lobbying" because it deals with national issues, and, if so, whether the sale is within the scope of the investigative power of the Committee or of the Congress.

Appellant raises other questions respecting rulings of the trial judge during the course of the trial. We find it unnecessary to consider them.

The judgment of the District Court is reversed, and the case will be remanded with instructions to dismiss the indictment.

*Reversed and remanded.*

BAZELON, *Circuit Judge*, dissenting: Edward R. Rumely, the appellant, was ordered to appear before the House Select Committee on Lobbying Activities<sup>1</sup> to testify with regard to the Committee on Constitutional Government<sup>2</sup> of which he is Executive Secretary. The Buchanan Committee's mandate was

" \* \* \* to conduct a study and investigation of  
 \* \* \* all lobbying activities intended to influence,  
 encourage, promote or retard legislation \* \* \*"<sup>3</sup>

<sup>1</sup> Hereafter referred to as the Buchanan Committee.

<sup>2</sup> Hereafter referred to as CCG.

<sup>3</sup> H. Res. 298, 81st Cong., 1st Sess. (Aug. 12, 1949), printed in *Hearings before House Select Committee on Lobbying Activities*, 81st Cong., 2d Sess., pt. 1, p. 1 (1950), (hereafter cited as *Hearings*), and also J. A., p. 188.



It was interested in learning how the CCG and Rumely—both registered under the Federal Regulation of Lobbying Act—operated, where the organization's funds came from, etc., in order to determine whether there was anything in its activities and those of other organizations which might require revision of existing lobbying laws.

As a part of this investigation, the Buchanan Committee sought to ascertain whether so-called purchases of books and pamphlets from the CCG for amounts of \$500 or more were really disguised contributions—a device to evade those sections of the Lobbying Act which require “any person \* \* \* who \* \* \* receives money \* \* \* to be used principally to aid \* \* \* [t]he passage or defeat of any legislation by the Congress of the United States [or] [t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States”<sup>5</sup> to report to the Clerk of the House of Representatives “the name and address of each person who has made a *contribution of \$500 or more.*”<sup>6</sup> This phase of the inquiry revealed that shortly after the statute was enacted and the appellant and the CCG had registered thereunder, the CCG had changed its pattern of financial support. Its new policy was to reject and return “contributions” in excess of \$490<sup>7</sup> unless the remitter designated “the material purchased and the direc-

<sup>4</sup> 60 STAT. 839, 2 U.S.C. § 261 (1946). Registration was under protest, J.A., p. 182, apparently on the theory that the CCG was a “publisher,” rather than a lobbying organization, Brief for Appellant, pp. 14-16, and did not have as its principal purpose “[t]o influence, directly or indirectly, the passage or defeat of any legislation.” 60 STAT. 839, 841, 2 U.S.C. § 266 (1946).

<sup>5</sup> *Ibid.*

<sup>6</sup> 60 STAT. 839, 840, 2 U.S.C. § 264(a)(1) (1946). Emphasis supplied. See H. R. REP. No. 3024, 81st Cong., 2d Sess. 1-3 (1950), (hereafter cited as H. R. REP. No. 3024) which is a part of the record in this case as Government Exhibit No. 4.

<sup>7</sup> *Id.* at 1-3, 9.

tion of its distribution."<sup>8</sup> Rumely admitted that this policy was adopted "[t]he moment the [lobbying] law went into effect,"<sup>9</sup> and because "[w]e didn't want to get into the position of reporting our contributors."<sup>10</sup>

It was in the light of these admissions and the Buchanan Committee's desire to learn the financial sources which were making possible the vast operations of CCG<sup>11</sup>

<sup>8</sup> Letter of Jan. 17, 1950, from Summer Gerard, Treasurer, Committee for Constitutional Government, to Mr. E. L. Noyes, Eli Lilly & Co., printed in *Hearings* pt. 5, p. 32; reproduced in note 31, *infra*.

<sup>9</sup> *Hearings* pt. 5, p. 37.

<sup>10</sup> *Id.* at 29. See also *id.* at 37, 42. H. R. REP. No. 3024 states, at page 2:

"Of particular significance is the fact that Edward A. Rumely and the Committee for Constitutional Government, Inc., in recent years have devised a scheme for raising enormous funds without filing true reports pursuant to the provisions of the Federal Regulation of Lobbying Act. This scheme has the color of legality but in fact is a method of circumventing the law. It utilizes the system \* \* \* whereby contributions to the Committee for Constitutional Government are designated as payments for the purchase of books, which are transmitted to others at the direction of the purchaser, with both the contributor of the money and the recipients of the books totally unaware of the subterfuge in most cases."

The theory behind this arrangement was, of course, that the names of "purchasers of books" for amounts of \$500 or more need not be reported under the Lobbying Act whereas "contributors" giving \$500 or more would have to be disclosed.

<sup>11</sup> The nature of the CCG operation was one that required large amounts of money. H. R. REP. No. 3024 points out, at page 1, that Rumely and the CCG " \* \* \* have registered and reported as lobbyists under the Federal Regulation of Lobbying Act since October 7, 1946. Since that date the Committee for Constitutional Government, Inc., has reported spending approximately \$2,000,000. One of the chief functions of the Committee for Constitutional Government, Inc., is the distribution of books and pamphlets presenting one side of national legislative issues. In the period 1937 to 1944, prior to the enactment of the Federal Regulation of Lobbying Act of 1946, the Committee for Constitutional Govern-

that it asked Rumely for the names of "purchasers" of \$500 or more of CCG's books and pamphlets. Apparently the Buchanan Committee wanted to question these people in the process of further establishing that some were not bona fide purchasers but merely heavy contributors to the lobbying activities of which CCG was the focal point. It was at this juncture that Rumely and the Buchanan Committee came to loggerheads. Because Rumely refused to disclose the names requested, he was afterwards cited for contempt of Congress.<sup>12</sup>

The scope of a congressional committee's investigation is limited by statute to matters pertinent to the inquiry authorized by Congress. And "[t]he question of pertinency . . . [is] one of law."<sup>13</sup> The trial court instructed the jury as a matter of law that the Buchanan Committee

ment, Inc., distributed some 82,000,000 booklets, pamphlets, and other pieces of literature, or at the rate of about 12,000,000 pieces a year." This material was sent to "every type of [mailing] list," *Hearings* pt. 5, p. 93, of "opinion molders" including clergymen, labor and farm leaders, educators, governors and legislators, doctors, journalists, business executives and millionaires. *Id.* at 95. Much of this material, Rumely admitted, was sent out under congressional frank. Letters written by Rumely indicated that one CCG technique was to have some Member interested in a particular subject and statement introduce it into the Congressional Record. *Id.* at 98-102, 106-7. The Congressman then ordered a number of copies designated by the CCG to be printed by the Government Printing Office. And since the CCG could not draw a check to the Government Printing Office, payment was made to the Congressman who in turn remitted to the Government Printing Office. *Id.* at 97-107. Rumely admitted sending 2,800,000 pieces out under frank in 1949, *id.* at 101, and eight to ten million between the passage of the Lobbying Act and the Buchanan Committee investigation. *Id.* at 97-8. In addition to the flood of pamphlets, the CCG published millions of books as indicated in the majority opinion of the court.

<sup>12</sup> Rumely was also indicted for refusing to disclose the identity of a woman from Toledo who gave CCG \$2,000 for the distribution of "The Road Ahead." J. A., pp. 4, 32.

<sup>13</sup> *Sinclair v. United States*, 279 U. S. 263, 298 (1929).

“was a validly constituted committee of Congress; that said committee had jurisdiction over the matters under consideration; that the records and information requested, as alleged in Counts 1 and 6, and the question asked, as alleged in Count 7, were pertinent thereto \* \* \* ”<sup>14</sup>

The jury then found Rumely guilty of contempt of Congress.

Before discussing the broader issues presented by this appeal, I turn for a moment to consider a narrower aspect of the case. It has to do with the Government's reliance upon the fact that both Rumely and the CCG had registered under the Lobbying Act to establish the pertinency to the inquiry of the information sought by the Buchanan Committee.<sup>15</sup> In rebuttal, Rumely showed that he and the CCG had registered under protest. He did not claim that registration was induced or coerced by any governmental source. I agree with the trial judge's ruling that proof of registration was a sufficient basis for establishing the pertinency of the information sought. I think it reasonable to conclude that by registering Rumely and the CCG recognized the possibility, at least, that their activities might be found to constitute attempts “[t]o influence, directly or indirectly, the passage or defeat of any legislation.” It can hardly be said that the Buchanan Committee was without power to inquire into the operation of the Lobbying Act and to determine whether the Act does or should reach the activities of a registrant. Clearly pertinent—in fact, vital—to such an inquiry was the information concerning the source and pattern of CCG's financial support.<sup>16</sup>

<sup>14</sup> J. A., p. 175.

<sup>15</sup> J. A., pp. 40-2.

<sup>16</sup> “Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Committee for Constitutional Government, Inc., is evading or violating the letter



Although the fact of registration alone was sufficient to establish pertinency, the BUCHANAN COMMITTEE REPORT CITING EDWARD A. RUMELY which was made a part of the record in this case, makes it clear that the questions which Rumely refused to answer were pertinent to the legislative inquiry. In addition, the Buchanan Committee hearings, which were only partially introduced in the trial record, support this conclusion.<sup>17</sup> Since judicial

or the spirit of the Federal Regulation of Lobbying Act by the establishment of class or contributions called 'Receipts from the sale of books and literature,' or whether they are complying with a law which requires amendments to strengthen it.

"The policy of the Committee for Constitutional Government, Inc., of refusing to accept contributions of more than \$490 unless earmarked for books, etc., may also involve: (1) Dividing large contributions into installments of \$490 or less, and causing the records of the Committee for Constitutional Government to reflect receipt of each installment on a different date, and/or causing the records of the Committee for Constitutional Government to give credit, for the several installments, to various relatives and associates of the actual contributor. (2) Causing the Committee for Constitutional Government's records as to 'Contributions' to reflect less than the total amount of contributions actually received, by labeling some part of such funds as payments made for printed matter.

"Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Federal Regulation of Lobbying Act requires amendment to prevent division of large contributions into installments, or to prevent the crediting of contributions to others than the real contributor, or to prevent the use of other subterfuges." H. R. REP. No. 3024, pp. 2-3.

<sup>17</sup> While the hearings insofar as they pertain to Rumely and the CCG, were not made a part of the record in their entirety, they were filed with the trial court, under the conditions agreed to in the following colloquy:

"MR. HITZ [Government Counsel]: I may say, Your Honor, that for the purposes of this trial it has been agreed between Mr. Burkinshaw and myself that the two volumes, Part 4 and Part 5 of the hearings, insofar as they relate to Mr. Rumely, are correct and we will not go to the reporter or to any shorthand notes for that purpose. Is that right?

"MR. BURKINSHAW [Counsel for Rumely]: That is right, absolutely."



notice can be taken of congressional hearings, there is no reason why an appellate court "should not advise itself from outside the record of such facts as appear to admit of no genuine dispute."<sup>18</sup> As will appear, the evidence adduced before the Buchanan Committee furnishes both supplementary and independent grounds supporting the trial court's ruling that the information sought was pertinent to the inquiry.<sup>19</sup>

Turning now to the broader issues of the case, appellant says, in substance, that (1) the House Resolution<sup>20</sup> did not undertake to authorize any inquiry to which the requested information would be pertinent; (2) the requested information was beyond the constitutional limits of legislative inquiry; and (3) compulsory disclosure of this information would violate First Amendment rights.

(1) This court says that, by definition or common understanding, the words "all lobbying activities," which House Resolution 298 authorized the Buchanan Committee to investigate, refer only to "representations made di-

<sup>18</sup> *United States v. Aluminum Company of America*, 148 F. 2d 416, 445 (2d Cir. 1945); see also *United States v. Darby*, 312 U. S. 100, 109 (1941); *Overfield v. Pennroad Corporation*, 146 F. 2d 889, 898 (3d Cir. 1944).

<sup>19</sup> "This court has repeatedly held—and it is not alone in so holding—that a judgment need not be affirmed solely upon the ground that seemed controlling to the lower court. A fortiori, this court is not bound by the theory urged by the successful litigant below. The rule might be otherwise, though we are not here so holding, if the appellant urged one ground in the court below, assigned error, and then changed his position on appeal. It might then be urged, perhaps, that the lower court should have been given the benefit of the appellant's theory, and thus possibly have avoided the alleged error." *Wagner v. United States*, 67 F. 2d 656, 657 (9th Cir. 1933); cf., *Smith v. United States*, 173 F. 2d 181, 185 (9th Cir. 1949).

<sup>20</sup> H. Res. 298, 81st Cong., 1st Sess. (Aug. 12, 1949), printed in *Hearings* pt. 1, p. 1, and also J. A., p. 188.

rectly to the Congress, its members, or its committees.”<sup>21</sup> I think this definition unduly narrow. Lobbying has had a broader sense for at least forty years. The court’s constricted concept of lobbying provides the premise for its conclusion that questions with regard to *indirect* lobbying techniques are not pertinent to an inquiry said by the court—but not by Congress—to be limited to *direct* representations to Congress. Since I think the court’s basic premise incorrect, I must reject the conclusion built upon it.

As early as 1913,

“\* \* \* House and Senate investigations \* \* \* gave the first thorough airing to what might be properly called modern lobbying as we know it today. The Senate investigation was prompted by President Wilson’s charge that an industrious and, as he called them, ‘insidious body of tariff lobbyists,’ was spending money without limit in an effort to create an impression of public opinion contrary to some of the chief items of the administration’s sponsored Underwood tariff bill.

“Each committee in its own way also concluded that even in 1913 lobbying consisted less of personal appeals to Congressmen than it did of organized efforts to mold public opinion and influence Congress by means of the artificially created public pressure.”<sup>22</sup>

This trend, already apparent in the early part of the century, has since become accelerated. Present day means of communication, which have changed modes of living and the course of history, have also relegated the restrictive concept of direct “contacts with legislators” as a means of influencing legislation to the horse and buggy era. The

<sup>21</sup> Page 15, *supra*. Emphasis supplied.

<sup>22</sup> *Hearings* pt. 1, pp. 54, 55.

appellant himself, in a pamphlet entitled "Needed Now—Capacity for Leadership, Courage to Lead," deprecated the value "of such old lobbying techniques as 'noisy delegations \* \* \* which buttonholed legislators' and 'stunts which attract some popular attention but persuade no Congressmen.'" <sup>23</sup> Congress has long recognized that modern media for mass communication have brought with them the need for vigilant inquiry.<sup>24</sup> And in House debate on the very resolution under which the Buchanan Committee acted, Members of the House (1) specifically mentioned the CCG as being a large lobbying organization and (2) indicated that one aim of the investigation would be to determine how organizations, in reporting under the Lobbying Act, were allocating their expenses between legislative lobbying and "nonlegislative" or "noncongres-

<sup>23</sup> This pamphlet is quoted in *Hearings* pt. 5, p. 6.

<sup>24</sup> To that end it has adopted "the principle of disclosure in both the economic and political spheres. The Securities and Exchange Commission, the Federal Trade Commission and the Pure Food and Drug Administration make available to the public information about sponsors of economic wares. In the political realm, the Federal Communications Commission, the Post Office Department, the Clerk of the House of Representatives, and the Secretary of the Senate—all of these under various statutes—are required to collect information about those who attempt to influence public opinion. Thousands of statements disclosing the ownership and control of newspapers using the second-class mailing privilege are filed annually with the Post Office Department. Hundreds of statements disclosing the ownership and control of radio stations are filed with the Federal Communications Commission. \* \* \* In 1938, Congress found it necessary to pass the Foreign Agents Registration Act which forced certain citizens and aliens alike to register with the Department of Justice the facts about their sponsorship and activities. \* \* \*

"\* \* \* [The Government] ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship, and background of those who are active in the market place of public opinion." *To Secure These Rights: The Report of the President's Committee on Civil Rights* 52-3 (1947).

sional lobbying.”<sup>25</sup> Any concept of “lobbying activities” which ignores the realism of the day is an archaic one, bottomed either on outmoded dictionary definitions or on judicial constructions drawn from unrelated contexts.<sup>26</sup> I think Congress directed the Buchanan Committee to investigate indirect as well as direct lobbying techniques and that the information requested from Rumely was pertinent to such investigation.

(2) To say that modern methods of lobbying cannot be inquired into by virtue of the same power which permits legislative inquiry into the older and less effective methods would be to stifle the legislative process. Yet I understand appellant's contention to be that the information demanded by the Buchanan Committee was beyond the constitutional limits of legislative inquiry because no valid legislation could deal with indirect lobbying.

It is of course true that the area for legislating with respect to the whole lobbying problem is subject to constitutional limitations. This is merely another instance of the price we pay for the protection of things we deem far more valuable. But constitutional boundaries cannot be marked by the shotgun argument that no valid legislation could possibly emanate from a legislative inquiry to which the information sought here would be pertinent. As the Second Circuit said in *United States v. Josephson*:<sup>27</sup>

<sup>25</sup> 95 Cong. Rec. 11386, 11389 (1949). See also the remarks of Congressman Buchanan at the opening of the inquiry. *Hearings* pt. 1, pp. 7-8.

<sup>26</sup> For a discussion of modern lobbying techniques, see, e.g., Comment, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L. J. 304 (1947).

<sup>27</sup> 165 F. 2d 82, 90-1 (1947), cert. denied 333 U. S. 838, rehearing denied, 333 U. S. 858, motion for leave to file a second petition for rehearing denied 335 U. S. 899 (1948).

"\* \* \* in substance [the contention] is that the Committee's power to investigate is limited by Congress' power to legislate; Congress is prohibited from legislating upon matters of thought, speech, or opinion; ergo, a statute empowering a Congressional committee to investigate such matters is unconstitutional. The mere statement of this syllogism is sufficient to refute it. Congress obviously can use information gathered by this Committee to pass legislation not encroaching upon civil liberties, as above noted. The appellant's argument necessarily, therefore, is reduced to the absurd proposition that because the facts resulting from the Committee's investigations conceivably may also be utilized as the basis for legislation impairing freedom of expression, the statute authorizing such investigations must be held void."

We are not dealing here with the constitutionality of an Act of Congress. Nor are we being asked to render an advisory opinion on the constitutionality of legislation which might conceivably be drafted at some time in the future. As this court said a few years ago in the *Barsky* case,<sup>28</sup> Congress was engaged here in a "preliminary inquiry [which] has from the earliest times been considered an essential of the legislative process. \* \* \* Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry."

Congress, through the Buchanan Committee, was concerned with a perennial problem in our democracy—how to deal with highly organized pressure groups, and the distortions and evils they sometimes bring in their wake, and how to distinguish such groups from individual citizens petitioning their representatives. Neither direct nor indirect lobbying is an evil and a danger, but either can

<sup>28</sup> *Barsky v. United States*, 83 U. S. App. D. C. 127, 131, 167 F. 2d 241, 245 (1948), cert. denied 334 U. S. 843.



become so, if plainly or subtly dishonest methods are used to distort the legislative function. The court recognizes that this is true with respect to indirect lobbying when it says that "an evil might arise" "if influences upon public opinion were being bought and prostituted."<sup>29</sup> I reject the notion that because Congress may not constitutionally *prohibit* indirect lobbying activities, it is without power to provide any measure of protection for itself and the public from its abuse. And here, since the Buchanan Committee had strong reason to believe that the abuse had already arisen, the attending circumstances were clearly pertinent to its inquiry. A convincing example to support that belief is found in the letter under date of January 10, 1950, from Eli Lilly & Co., a corporation manufacturing medicinal products, advising that their "budget committee had approved a contribution<sup>30</sup> of \$25,000 to the CCG for the calendar year 1950"; and the CCG's reply thereto under date of January 17, 1950. These letters are reproduced in his margin.<sup>31</sup>

<sup>29</sup> Majority opinion, p. 14.

<sup>30</sup> Emphasis supplied.

<sup>31</sup> Letter from E. L. Noyes, Eli Lilly & Co., Indianapolis, Indiana:

"January 10, 1950.

"COMMITTEE FOR CONSTITUTIONAL GOVERNMENT,  
205 East Forty-Second Street, New York 17, N. Y.

"GENTLEMEN: This is to advise you that our budget committee has approved a contribution of \$25,000 to the Committee for Constitutional Government for the calendar year 1950.

"In approving this contribution, it was the consensus of opinion of our budget committee that we should like to have you use some of these funds in distributing books, pamphlets, Paul Revere messages, etc., to a mailing list which we will supply you with. Such a mailing list would include school teachers, members of the clergy, and other influential groups of our local community. Can you advise me as to how large a mailing list this contribution will supply with the educational material which your committee publishes?

"It is also our opinion that perhaps distribution of every pub-

lication to these individuals might be so excessive as to do more harm than good. The tendency might arise for these people to throw everything that comes in the mail into the nearest wastebasket. Therefore, would it be possible, in case we so desire, to supply you with a mailing list and to have you mail to them only those publications which we designate.

"With all good wishes for a very successful year, I am

Sincerely yours,

E. L. NOYES."

Reply of Sumner Gerard, Treasurer, CCG:

"COMMITTEE FOR CONSTITUTIONAL GOVERNMENT

January 17, 1950.

"MR. E. L. NOYES,

*Eli Lilly & Co., Indianapolis 6, Ind.*

"MY DEAR MR. NOYES: Your letter of January 10 announcing a \$25,000 purchase of our educational material was a source of great encouragement to Dr. King and myself. Because of Mr. Gannett's frequently expressed admiration and friendship for you, we sent him a copy of your letter. On Monday morning, he telephoned from Miami Beach greatly pleased over this news.

"Your substantial purchase so early in the year will enable us to lift our committee's activities to higher levels of effectiveness. We have found that money put to work in January multiplies itself several fold during the year by bringing in additional support. This purchase of material should be charged on your books as an outright purchase and not as a contribution.

"The firm of Farabaugh, Pettengill, Chapleau & Roper have given us an opinion that such purchases of material to uphold our free-enterprise system are legitimate corporate expense, like other advertising, and the Treasury Department has accepted in hundreds of cases such expenditures as legitimate corporate purchases. When purchasing, it is necessary for the purchaser to do exactly what you suggest, namely to designate the material purchased and the direction of its distribution.

"We will service a list of 5,000 names at \$4 per individual name 22 times between February and December 1950; on a list of 10,000 eleven times; or of 25,000 four times. In connection with this we will include the distribution of 5,000 copies of Norton's great book *The Constitution of the United States: Its Sources and Its Application*, and 3,000 copies of Pettengill's *For Americans Only*. We stand ready to cooperate with you in working out in detail, as

may best suit your wishes, the servicing of such lists as you designate.

"We suggest that you set aside \$8 per name for the full Paul Revere messages service to 300 including all State legislators in Indiana (150), the balance of 150 to go to names that you particularly designate in your own organization or in the city of Indianapolis. We will include in this service a copy of the Norton book and a copy of Dr. King's *The Keys To Prosperity* which should have a special value to State legislators.

"With \$20,000 for the mailings, \$2,400 for this Paul Revere service to 300 names, there would be left \$2,600. We would suggest that you set aside this amount, at \$1 per copy, for 2,600 copies of *Compulsory Medical Care* and the *Welfare State* by Melchior Palyi. The report upon which this book is based was worked up at a substantial expenditure by the National Physicians Committee before it disbanded. We expect to have shortly 20,000 copies in book form, publication price \$2. Our price to you will be \$1 per copy.

"The contents of the book are of such great importance that distribution to key leaders in national thinking and in positions of public influence should be made soon. If you agreed to allot \$2,600 to this distribution we will bear distribution cost and send to all Members of Congress, all Governors, to selected editors, newspaper columnists, and radio commentators, and to 600 of the top level leaders in the medical profession, including all officers of State medical associations.

"Any portion of this distribution where you desired it we would be glad to include your courtesy card as donor. Otherwise we shall distribute over the name of the committee itself. In the case of Palyi's book we shall seek some individual of public influence to write an accompanying letter calling attention to the book and its great importance. In the distribution to Congress we might have Congressman Smith himself—the head of a medical clinic and highly respected in both Houses of Congress—write the accompanying letter asking that every Member read the content. Please note copy of the telegram to members of the Rules Committee enclosed herewith.

"Our trustees will meet on January 25 and it would be a matter of great encouragement if we could have this transaction closed by that date.

"In the meantime, if you or any other member of your organization comes to New York City, do give Dr. King and the other members a chance to exchange thought with you.

Sincerely yours,

SUMNER GERARD, *Treasurer.*"

To determine, *inter alia*, "if influences upon public opinion were being bought and prostituted,"<sup>32</sup> the Constitution permitted and Congress authorized a broad inquiry. The purpose of that inquiry was to find the problems, frame hypotheses for coping with them, and then, in the light of the facts brought out by the investigation, determine which hypotheses could best stand the test of experience, the Constitution and a vote in Congress. It cannot be seriously urged that every problem and every hypothesis must meet the test of constitutionality.

(3) If, as I believe, Congress had the power to and did authorize the Buchanan Committee's inquiry into indirect as well as direct lobbying activities, and that the particular questions in controversy here were pertinent to that inquiry, then in the absence of some constitutional privilege, appellant's refusal to answer was a contempt of Congress. Appellant claims such a privilege, resting his refusal of the requested information upon the lofty heights of the freedom of speech, press and petition guaranteed by the First Amendment. As I understand it, this claim is laid upon the factual premise that all amounts of \$500 or more were received from persons who purchased the CCG's literature, rather than persons who used ostensible purchases to cloak what were actually contributions for which disclosure was required by the Lobbying Act. I think the BUCHANAN COMMITTEE REPORT CITING

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These letters are reproduced in H. R. REP. No. 3239, 81st Cong., 2d Sess. 8-13 (1951), and are printed in *Hearings* pt. 5, pp. 32-3.

Congressman Buchanan also remarked: "I might say that the total amount of loans and contributions that you [Rumely] did furnish to the Committee aggregate a very small amount; a fact, I think it is about \$25,000, in contrast to the very wide ramifications of conduct of your Committee for Constitutional Government, which, running as of the current quarter, will exceed \$1,100,000 this year. I think that we have a right to know and have a right to seek that information." H. R. REP. No. 3024, p. 16.

<sup>32</sup> Majority opinion, p. 14.



EDWARD A. RUMELY and hearings make abundantly clear that this premise is untenable. I would therefore reject the claim of privilege of non-disclosure that rests upon it.

The BUCHANAN COMMITTEE REPORT CITING EDWARD A. RUMELY and the hearings on House Resolution 298 disclosed, as summarized above,<sup>33</sup> that the CCG is a registered and well-financed Lobbying organization engaged in distributing propaganda material on a large scale. In addition to the activities which the court regards as indirect, CCG also engaged in direct lobbying.<sup>34</sup> Finally, the Report and hearings disclose that the CCG changed its pattern of financial support upon passage of the Lobbying Act because "[w]e didn't want to get into the position of reporting our contributors." It seems to me immaterial that among those from whom the CCG received \$500

<sup>33</sup> See text and note 11, *supra*.

<sup>34</sup> Rumely stated at the hearings that he had registered as a lobbyist "because I send to Congress releases and other material," J. A., p. 12. Rumely admitted that CCG had attempted to influence legislation by circulating letters and telegrams to Members of Congress and "private citizens urging defeat of a presidential plan for reorganizing the National Labor Relations Board, *Hearings* pt. 5, pp. 66-8, H. R. REP. No. 3024, p. 11, protesting executive action under the Walsh-Healey Act, *Hearings* pt. 5, pp. 78-9, opposing pending public housing legislation, *id.* at 79-80, and medical care legislation, *id.* at 77-8, and supporting tax reforms, *id.* at 79, including a program for a constitutional limitation on individual income taxes, H. R. REP. No. 3024, pp. 13-14. In addition, the CCG occasionally arranged dinners for congressmen through its Washington representative, including an abortive effort to bring together a group of congressmen at a crucial time in the legislative voting on the Taft-Hartley Act, *Hearings* pt. 5, pp. 80-92. Plans for this dinner were made by Homer Dodge, Washington representative of the CCG. *Ibid.* Mr. Dodge's other duties apparently included keeping in touch with congressmen on matters of interest to CCG, especially the mailing of CCG propaganda under congressional frank. See various letters by Dodge reproduced at *id.* pt. 5, pp. 68, 106-7, 151. See also notes 11 and 16, *supra*.



or more, there may have been some who had other motives than the influencing of opinion and legislation. In any reasonable view of the facts, it is clear that appellant and the CCG engaged in a course of conduct calculated to disguise lobbying contributions as purchases.

• Congress has adopted the principle of disclosure as a means of preserving the integrity of the election process as well as the legislative process. Thus, for example, a recent enactment makes it unlawful to publish any pamphlet, advertisement, etc., relating to any person who has declared his intention to seek federal office unless the publication bears the name of the person responsible for its publication.<sup>35</sup> The Corrupt Practices Act requires the treasurer of a political committee to file with the Clerk of the House of Representatives "[t]he name and address of each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of \$100 or more, together with the amount and date of such contribution."<sup>36</sup> In the only attack on the latter provision to reach the Supreme Court, First Amendment rights were not even discussed. Instead, the Court said,

"To say that Congress is without power to pass appropriate legislation to safeguard [the] election

<sup>35</sup> 62 STAT. 719, 724 (1948), as amended, 18 U.S.C. § 612 (1951). 62 STAT. 718, 723 (1948), 18 U.S.C. § 608(b) (1951) reads: "Whoever purchases or buys any goods, commodities, advertising, or articles of any kind or description, the proceeds of which, or any portion thereof, directly or indirectly inures to the benefit of or for any candidate for an elective Federal office including the offices of President of the United States, and Presidential and Vice Presidential electors or any political committee or other political organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

<sup>36</sup> 43 STAT. 1070, 1071 (1925), 2 U.S.C. § 244 (1946).

[of the President and Vice President] from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection."<sup>37</sup>

No one would seriously contend that the requirements for disclosure under the Corrupt Practices Act are offensive to the Constitution. The First Amendment is not violated merely because disclosure might conceivably deter some from implementing their political views with financial support. And although the question before us does not depend upon the constitutionality of the analogous provisions in the Lobbying Act,"<sup>38</sup> the same principles are applicable to them. If legislation requiring financial disclosure is free from objection on First Amendment grounds, compulsion of these disclosures by legislative inquiry is likewise free from the same objection. The Buchanan Committee has restricted no one in the free exercise of his rights to say what he pleases, or to assemble and to petition for any purpose.

I do not think that the constitutional rights of free speech, press and petition afford a greater degree of protection to contributions in the disguised form of purchases than to contributions in pristine form. And since I believe that the latter are not protected from disclosure by First Amendment rights, I do not see how such protection can be accorded to the former. To hold otherwise would only reward artifice and subterfuge. The CCG's right to promote, retard and otherwise influence legislation is inviolate. But that right does not extend to protection from disclosure of its financial support. I would affirm the conviction.

<sup>37</sup> *Burroughs and Cannon v. United States*, 290 U. S. 534, 545 (1934). See also *United States v. United States Brewers' Ass'n*, 239 Fed. 163, 169 (W.D. Pa. 1916).

<sup>38</sup> 60 STAT. 839, 840, 841-2, 2 U.S.C. § § 264, 267 (1946).

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**IN THE**  
**Supreme Court of the United States**  
**October Term, 1952**

**No. 87**

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**UNITED STATES OF AMERICA,**

*Petitioner,*

**v.**

**EDWARD A. RUMELY,**

*Respondent.*

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**On Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia**

---

**BRIEF FOR THE RESPONDENT**

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IN THE  
**Supreme Court of the United States**

October Term, 1952

\_\_\_\_\_  
No. 87  
\_\_\_\_\_

UNITED STATES OF AMERICA,

*Petitioner,*

v.

EDWARD A. RUMELY,

*Respondent.*

\_\_\_\_\_  
**BRIEF FOR THE RESPONDENT**  
\_\_\_\_\_

**OPINIONS BELOW**

The opinions in the Circuit Court of Appeals reversing the order and judgment of the District Court and remanding the case to the District Court with instructions to dismiss the indictment are printed in full beginning on Page 193 of the Record. They are also reported in 197 F. 2d 166.

**JURISDICTION**

The decision of the Court of Appeals was rendered on April 29, 1952 (R. 224). The petition for a writ of certiorari was filed on May 28, 1952. The petition for a writ of certiorari to the United States Court of Appeals

for the District of Columbia was granted on October 13, 1952. (R. 227). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### STATUTE INVOLVED

This case presents a review of the decision of the Circuit Court of Appeals of the District of Columbia reversing the judgment of conviction of the respondent in the District Court on an indictment based upon alleged violations of R.S. 102, as amended, 52 Stat. 942, 2 U.S.C. 192, which provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, \* \* \* or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000, nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

### RESTATEMENT OF QUESTIONS PRESENTED

1. The first question is whether, under the guise of investigating "lobbying activities", Congress had power, or attempted, to authorize an inquiry and to compel testimony regarding private efforts to influence public opinion regarding federal legislation through the general sale and distribution of books and pamphlets.

2. The second question is whether a Committee of Congress, established for the purpose of investigating "lobbying activities", had constitutional authority (in the absence of any pretense that a "clear and present public danger" existed) to require a publisher, by subpoena or

interrogatories, to disclose the names and addresses of purchasers of books published and distributed by him, particularly when the publisher had made available to the Committee all his financial records except the names and addresses of such purchasers.

3. The third question is whether in this criminal action for contempt of Congress there was any evidence sufficient to support a ruling as a matter of law that the names and addresses of purchasers of books published by respondent's employer (in quantities costing over \$500.00) were pertinent to the Committee's inquiry into "lobbying activities".

### COUNTER STATEMENT OF THE CASE

The statement and argument of this case by the Solicitor General ranges so far afield from the issues, the evidence and the judicial rulings in the case actually before this Court, that a counter statement is necessary as the basis for any clear and sound argument.

The respondent, Edward A. Rumely, was convicted of contempt of a House Committee *solely* because of his refusal to furnish the Committee (by records or oral testimony) with the names and addresses of the purchasers of books published by the Committee for Constitutional Government, Inc., of which he was the Executive Secretary. He did *not* refuse to produce any of the "financial records" of the Committee for Constitutional Government, Inc. (hereafter described as "C.C.G.")

We quote from the opinion of the Court of Appeals as follows:

"But, as the case comes to us, *there was no refusal to produce financial records.*<sup>1</sup> Over and over again

<sup>1</sup> Italics throughout this brief are ours, unless otherwise indicated.



Rumely asserted before the Committee that he had given and was willing to give, all records except the names and addresses of the purchasers of the books. No contention was made at those hearings that he refused to give anything else. Upon the trial the prosecutor did not say that anything else was refused. On the contrary, he urged a different view. He insisted, and the Court sustained the view, that, so long as the names of purchasers of books were not given, financial records of contributions and loans were immaterial to the issues in the case." (R. 199, 200)

The Government contended in the Trial Court that the House Committee had a right to demand testimony as to the names and addresses of purchasers of books because that Committee was authorized to investigate, and was investigating, "lobbying activities", and that the "lobbying activities" of the C.C.G. were proved conclusively by the fact that the C.C.G. and Rumely had registered under the Lobbying Act as lobbyists. Therefore, it was contended that the testimony sought from Rumely was "pertinent" to the Committee inquiry into "lobbying activities".

The testimony of Rumely showed, and it was conceded, that he had registered himself and his organization as "lobbyists" *only under protest*. He repeatedly asserted: "I am not employed for the purpose of supporting or opposing legislation". (R. 182, 186, 187).

A curious feature of this case is that the Government successfully *opposed* any testimony or documentary evidence to show what the activities of the C.C.G. actually were; and the trial judge held and instructed the jury that "the nature of the activities of the defendant or of the organization with which he was connected is not the issue in this case". (R. 176) The Government contended in the Trial Court that the pertinency of the information sought from Rumely was established sufficiently and completely when it was shown that he had registered as a lobbyist.

Now, the Government contends in *this* Court that purchases of books were used as a subterfuge for making contributions to the C.C.G. in aid of lobbying. If this contention had been made in the Trial Court, it would have been plain that testimony, *which Rumely offered* regarding the activities of the C.C.G., must be admitted. Also, it would have been plain that the financial records of the C.C.G. were relevant and material. As the Court of Appeals held:

"Certainly if the pertinency of the question rested even in part upon the Committee's desire to probe into possible subterfuges, the financial records would have been relevant and material. The prosecutor urged and the Court held that the financial data was inadmissible." (R. 200)

So, we *now* have the strange contention made in this Court by the Government that the conviction of Rumely should be upheld because he and the C.C.G. were engaged in "lobbying activities", although he denied this and the Government successfully opposed any testimony as to what the activities of the C.C.G. were! We also face the contention that the financial transactions of the C.C.G. were a subterfuge to cover lobbying, although the Government successfully opposed any testimony regarding the financial records of the C.C.G.!

In a word, the Government is *seeking now* to sustain a conviction on the basis of alleged evidence that was not presented and presentation of which the Government successfully *opposed* in the Trial Court,—on the basis of imaginary and distorted evidence, the frailty and falsity of which the defendant was denied the opportunity to expose in the Trial Court. The Government is here seeking to take advantage of the novel theory of sustaining the conviction which was devised by the dissenting judge in the Court of Appeals, as to whose opinion the majority made the following appropriate comment:

*"We think our dissenting judge discusses a case which is not before us—issues not presented in the Trial Court, and facts not in evidence in this record." (R. 209)*

Before we proceed with a statement and argument of the case which actually is before this Court, we feel it necessary to demonstrate completely the unfairness of the statement and argument of the Solicitor General in the present case. We can assume that this Court will not be concerned with the extensive irrelevant discussion in the Government brief of the evils of lobbying and the propriety of investigations intended, at least ostensibly, to provide the basis for legislation against lobbying. But the Court may find it difficult to focus its attention on the very important major issue here presented which is: Can a Committee of Congress use its investigatory power to hamper, embarrass and thus "abridge" the constitutionally protected freedom of the press?

If we had here the simple question as to whether a well known, long-established publisher of books, magazines or newspapers could be haled before a Committee of Congress and compelled to testify as to the names and addresses of all the purchasers of his books or magazines or newspapers, we could expect confidently that there would be an emphatic denial by this Court of the existence of any power in the Congress to compel such testimony and thus abridge the freedom of the press. Hence, if the evidence before this Court in the present case *clearly* showed that the C.C.G. was *simply* a publisher of books and articles partly sold and partly distributed free to the general public, it would become immediately evident to this Court, as it did to a majority of the Court of Appeals, that a conviction of Rumely for contempt in refusing to reveal the names of purchasers of their publications could not be sustained.

What makes possible a confusion and misunderstanding of the present case is *not* any failure of Rumely to

testify as to the activities of his organization, but the refusal of the Government prosecutor and of the Trial Court to permit him to give such testimony. There was sufficient testimony given before the House Committee so that in its report citing Rumely for contempt the Committee itself stated flatly:

"The distribution of printed material to influence legislation indirectly *by influencing public opinion* is the basic function of the Committee for Constitutional Government." (H. Rep. 3024, 81st Cong. 2d Sess. p. 2).

(It is a curious example of the lack of candor in the Government Brief that, in quoting the foregoing sentence (petitioner's brief, Page 6), the Solicitor General *left out* the important words, "by influencing public opinion".)

In the hearings before the House Committee the respondent, Rumely, repeatedly sought to make it clear that the C.C.G. was not engaged in any "lobbying activities" as such activities are commonly defined. This point was brought out clearly in the opinion of the Court of Appeals. (R. 203, 204) It is obvious that many of the publications of the C.C.G., regarding political subjects or subjects of legislation would be transmitted to, or called to the attention of, members of Congress. But no one would contend that a publishing house was engaged in lobbying because the purchasers of its publications or the publisher himself sent copies to members of Congress.

The only feature of the activities of the C.C.G. which distinguished them from those of an ordinary publishing house was the fact that the C.C.G. distributed a great many publications free and sold a great many at less than cost with the avowed purpose of influencing public opinion in favor of the policies or programs advocated. (R. 90) In the Trial Court counsel for the defendant Rumely offered in evidence Judge Norton's handbook on "The Constitution" and other books "to show the character of the publications sold by this Committee", (the



C.C.G.) (R. 99) Also an engrossed copy of the Bill of Rights disseminated in numbers totaling millions and "types of all books and literature published and disseminated by this Committee for Constitutional Government". (R. 90, 99, 100, 102). Not only had these books been sold but also given away in enormous quantities.

Obviously, a publishing house which gave away great quantities of publications and which sold others at less than cost would find it necessary to raise money from the contributions, in addition to revenues received from the sale of books. (Again we point out, that all the financial records of the C.C.G. were made available to the House Committee.) Naturally many of these publications would be sent directly or indirectly to members of Congress. Hence, when the Lobbying Act was passed, which defined as a lobbyist anyone who solicited or received money to be used "to influence directly or indirectly the passage or defeat of any legislation by the Congress of the U.S.A." — a serious question arose as to whether the C.C.G. and its Executive Secretary were required by the law to register. In view of the severe penalties attached to any failure to register, the only discreet action for the C.C.G. and Rumely was to register under protest as a lobbyist. (See, "Penalties and Prohibitions," Sec. 310 of Lobbying Act) P. L. 601, 79th Congress, USC Title 2

This protest was obviously based on two propositions. First, that C.C.G. and Rumely were not engaged in lobbying under the terms of the law, and second, if the work they were engaged in were defined by the Act as "lobbying", the Act would be an unconstitutional abridgement of the rights of free speech and free press.

At this point it is appropriate and necessary to point out that the constitutionality of the Lobbying Act was challenged in the case entitled *National Association of Manufacturers of U.S.A. et al. v. J. Howard McGrath*



and a special statutory court in the District of Columbia held these provisions of the Act to be unconstitutional. (103 F. Supp. 510) Unfortunately, when this case reached this Court at this term, it was dismissed as moot on a technical ground and hence has not been reviewed by this Court. (No. 174 October 13, 1952, Rehearing denied November 18, 1952) But, we submit that the unanimous opinion of the statutory court is a sound opinion well grounded on many decisions of this Court and we must assume, until this Court holds otherwise, that the Lobbying Act is unconstitutional. This has a strong bearing upon the present case because it makes it clear that no evidence that the C.C.G. and Rumely were engaged in "lobbying activities" can be based on the fact that they registered *under protest* under that Act.

Yet, the *sole basis* for the contention of the Government, sustained in the Trial Court, for holding that Rumely was engaged in "lobbying activities" and that, therefore, the questions asked of him were pertinent, was the evidence presented by the prosecutor showing the registration *under protest*. Let there be no mistake as to the record in this regard. The prosecutor in the Trial Court stated:

"We think the evidence as to the pertinency to the resolution and therefore as to the inquiry of this Committee is *fully covered* when we have proved, as we have here, that there was registration by the organization of which Mr. Rumely was the Executive Secretary". (R. 40).

He further stated:

"We think; in view of the fact that he was registered and his organization was registered, even though, as he stated under protest, that it shows some, if not all of the activities of the Committee for Constitutional Government came within the purview of an inquiry by this Committee." (R. 40)

It must be remembered that there was no further evidence offered in behalf of the Government to prove that the C.C.G. and Rumely were engaged in "lobbying activities", except the evidence that they published books and pamphlets discussing matters that had been or might be subjects of legislation. Accordingly, there is *no basis* for the contention of the prosecution that the questions asked of Dr. Rumely were pertinent to an inquiry into "lobbying activities", *except* the evidence that they had registered *under protest* under a law whose definition of "lobbying activities" might have been held to cover any publication of books on political subjects—a law which has been held unconstitutional because of the vagueness and invalidity of any such definition of "lobbying activities".

*The only real issue presented on appeal from the Rumely conviction* was whether a publisher of books could be compelled to reveal the names and addresses of purchasers of his books, or whether such an attempt by a Committee of Congress was an unconstitutional abridgement of the freedom of the press. To state the issue is practically to answer it. But in view of the extraordinary scope of power which the government seeks to sustain in a Congressional Committee, despite the flat denial of such a power in the Constitution, we must proceed patiently to argue this issue. However, before so doing, brief attention should be given to the false issue raised by the Government's Petition and Brief. That is the pretense that what the House Committee was here seeking was to investigate a "subterfuge" whereby, under cover of purchases of books, contributions were made to lobbying—contributions to an organization which was engaged in lobbying.

In addition to the discussion of this false issue, and the dominating real issue in this case, we shall find it necessary to consider with reasonable brevity the manifold

errors of the Trial Court in its rulings on evidence and instructions to the jury. If, as is plain from the opinion of the Court of Appeals, the Trial Court should have granted the motion for a judgment of acquittal which was made at the conclusion of the Government's evidence, or granted the motion when renewed at the close of all the evidence, then the other errors of the Court, in denying the defendant his right to present relevant evidence and in other improper rulings, need not be considered. These errors were not passed upon by the Court of Appeals because the Court found it unnecessary to consider them. We assume that this Court will be of the same opinion, but it would be unfair to the respondent, and perhaps presumptuous on our part, to assume a favorable ruling upon the major issue in this case, especially in view of the fact that this Court has granted certiorari. So it will be necessary before we conclude this brief to review the substantial errors of the trial judge in his rulings on evidence and in instructions to the jury—rulings which denied to the defendant rights so substantial and universally upheld that no conviction resulting from such errors could possibly be sustained.

## SUMMARY OF ARGUMENT

### 1. *The False Issue*

The government is seeking to have reviewed here a case which was not tried but which on the contrary, the government refused to have tried in the trial court. The Solicitor General concedes that the transcriptions of the Hearings before the House Committee and the Committee Report were not admitted as evidence, nor made a part of the record in this case, but urges that this court should take judicial notice of them as did the dissenting judge in the Court of Appeals.

Due process of law requires that if judicial notice is taken of testimony at a Congressional Hearing or in-

cluded in a Congressional committee Report, then the party on trial must have an opportunity to refute

In this case, the trial court did not consider the Report or Hearing now sought to be judicially noticed. They were not introduced into the record in any manner (except for fragmentary extracts from the Hearings); and the trial court, at the insistence of the prosecution, refused respondent's proffer of evidence which would have refuted the conclusions now sought to be drawn from these extraneous documents. The lawfulness of the conviction of the respondent in this criminal case must be determined by the formal record, made up and transmitted as required by law.

## 2. *The Major Real Issues*

a. The Buchanan Committee was only authorized to investigate "lobbying activities" intended to influence, encourage, promote or retard legislation. This authorization did not extend to efforts to influence public opinion which might "indirectly" influence legislation. (H.R., Res. (281st Cong.)

b. The public sale of books and documents intended to influence public opinion is not a form of "lobbying" subject to Congressional regulation; and the attempt to compel the furnishing of the names of the purchasers of such books and documents was a clear violation of freedom of the press and of the Constitutional rights of the respondent.

c. The argument of the government is based upon the apparent assumption that the language and doctrines of the Bill of Rights are so old fashioned as to hamper unduly the desire of an "up-to-date" legislator to terrorize and regulate by investigation.

## 3. *The Minor Real Issues*

The Court of Appeals based its sound decision on the foregoing grounds. However, other adequate grounds for affirming its action are clearly apparent in the record.



a. There was no evidence in the Record sufficient to support the trial court's rulings in regard to pertinency; and relevant evidence as to pertinency proffered by respondent was erroneously excluded.

b. The subpoenas issued by the Buchanan Committee were invalid in that they were not induced by any evidence, were not supported by oath or affirmation and did not allege that the information sought as to the names of the purchasers of books was pertinent to the inquiry.

c. The trial court erroneously charged the jury in respect to the meaning of "willful" in the statute involved.

## ARGUMENT

### I The False Issue

**The Government's Argument is Based Upon a Case Which The Prosecutor Refused to Have Tried and Upon Evidence Not in the Record.**

Although the respondent Rumley was formally found guilty by a jury, all the controversial issues raised in his defense were held by the trial judge to be issues of law; and all of them were then decided by the judge against the defendant's contentions. The District Court held and instructed the jury that the House Committee had been given authority to investigate "lobbying activities" and that it was pertinent to its authorized investigation to require the C.C.G. as a publisher to reveal the names and addresses of all purchasers of his books. The *only* evidence presented to the trial judge and considered by him, in support of his ruling that the testimony demanded and refused was pertinent to the Committee's inquiry, was evidence the C.C.G. and Rumely had registered under protest as lobbyists.

We quote from the Record, Page 43:

• "THE COURT: Frankly, if you are going to address yourself to that particular thing I can't im-



agine anything more pertinent in connection with lobbying than asking the names and dollars and cents contributed; because that is what makes the wheels spin, it seems to me."

Immediately following the above remark the prosecutor stated: "We have offered all of our pertinency testimony," and stated, "We are prepared to rest now." Counsel then proceeded at once to arguments in support of (and in opposition to) defendant's motion for a directed verdict of acquittal, which the Court denied. (R. 68)

Thus, it is clear beyond dispute that there was no evidence presented to and considered by the trial judge in the support of the contention which is *now* made by the government on appeal, but was *not* made in the trial court: that payments made to the C.C.G. for the purchase of books were actually subterfuges to disguise contributions to lobbying.

The reason why the government did not make this contention in the trial court was because it could be easily refuted. The C.C.G. did not engage in any lobbying, unless "lobbying" were defined to include the publication of books and documents which, because of their influence upon public opinion, might have an indirect influence upon the passage or defeat of legislation. The Government brief in this Court concedes that the C.C.G. "rarely, if ever, engaged in direct representations to Congress". (Brief Page 30) Therefore, any contributions for the support of the C.C.G. *could* only be used by it—and *were* only used—to cover losses occasioned by the free distribution of printed material, or because of sales to purchasers at prices below cost.

If the prosecutor in the trial court had attempted to introduce evidence that payments for books were subterfuge contributions, his contention and his evidence would have bounced back in his face because then the door would have been open to testimony by Rumely as to what the activities of the C.C.G. really were, and open to

the production of financial records to prove that all the money received by the C.C.G. for payments of books, or from conceded contributions, were all expended in carrying on the activity of publishing books and other printed material for the purpose of influencing public opinion in favor of political and economic policies and programs approved by the trustees of this non-profit organization.<sup>2</sup>

The prosecutor in the trial court quite obviously adopted the strategy of relying upon two legal contentions: First, that "lobbying activities" which the House Committee was authorized to investigate were intended to cover, and constitutionally could be construed to cover, any enterprise publishing books which supported or opposed political policies or programs. Second, that since the C.C.G. and Rumely had registered as lobbyists that registration constituted conclusive proof that their activities were subject to investigation by the House Committee. (See Opinion by Court of Appeals, R. 200)

The prosecutor managed to convince the trial judge that he had made out not only a prima facie case, but one which the defendant Rumely should not be permitted to controvert *because, upon objections by the prosecutor, the trial judge would not permit Rumely to testify as to what the activities of himself and his organization were, or what their financial records showed.* The trial judge would not even permit defendant Rumely to introduce copies of the publications of the C.C.G. despite the fact that the government prosecutor had read into the Record some of the testimony taken by the House Committee regarding these same C.C.G. publications! (R. 41-42)

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<sup>2</sup> The material from the House Committee (the Report, quoted by the dissenting judge in the Court of Appeals), itself demonstrated that the alleged "subterfuge" contributions were used to pay for the distribution of books and other printed documents. The majority opinion quoted Rumely's explicit disavowal: "I am not employed to support or oppose any legislation whatsoever". (R. 196)

policies and programs, and inevitably exercising and intended to exercise an influence to "encourage, promote or retard legislation." If the Congress had attempted to enact a law regulating, restricting and embarrassing *such* freedom of the press there would have been a roar of opposition from every section of the country and every organization of citizens desirous of influencing or shaping public opinion.

There must be some intelligible meaning given to the use of the word "lobbying" in the resolution creating and authorizing the investigations of the Committee. The obvious limitation is that stated by the Court of Appeals when it held that "Congress was certainly aware of the common meaning of the words lobbying activities when it used them in conferring authority upon the Buchanan Committee. At the most, the words depict no more than representations made directly to the Congress, its members, or its committees." (R. 204)

If, as the Court of Appeals pointed out, the House Resolution was intended to "encompass the full scope of the Regulation of Lobbying Act," then the validity of the resolution is made dubious for the very reasons which induced a three-judge statutory court to declare unanimously that Sections 303 to 307 of the Lobbying Act are unconstitutional. (R. 205) Hence the Court of Appeals, following well-established law, undertook to give a *valid* construction, if possible, to the House Resolution and held that it authorized investigation of only "lobbying in its commonly accepted sense, and did not purport to convey power to investigate efforts to influence public opinion." From this construction of the Resolution the Court concluded that the demand made upon Rumely for the names of purchasers of books was "outside the terms of the authority of the Buchanan

Committee, since the public sale of books and documents is not 'lobbying.'" (R. 205)

We are printing as an appendix to this brief a complete copy of the opinion of the three-judge statutory court holding that Sections 303 to 307 of the Lobbying Act are unconstitutional, because this opinion also demonstrates why the House Resolution here involved *would be invalid*, if construed to authorize an investigation of (as a "lobbying activity") the publishing and sale of books intended to influence public opinion:

The Solicitor General concedes that "general legislation compelling disclosure of the names of C.C.G.'s larger purchasers would probably be voided, or Congress forbidden to compel by continuous inquiry a regular, repeated disclosure of names." (G. Brief 77-78). But, he contends that, nevertheless, the Select Committee could validly make an "*ad hoc* demand for disclosure" of this same information, disclosure of which could not be compelled by "general legislation." We would point out, first, that the contention that Congress, through an investigating committee, can compel a disclosure of information which could not be compelled by statute, is an outrageous effort to justify doing an unlawful act indirectly, which the Congress is specifically forbidden to do directly.

Second, in authorizing a committee investigation of a subject matter as vague as "lobbying activities," the House Resolution was subject to the same charge of invalidity which the three-judge statutory court sustained against the Lobbying Act. The statutory court held, on the basis of a long line of decisions in this court, that a criminal statute "must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action or failure to act is prohibited."



Then the statutory court held that the phrase, "to influence directly or indirectly the passage or defeat of any legislation by the Congress" was "manifestly too indefinite and vague to constitute an ascertainable standard of guilt." (App. P. 64)

The Lobbying Act was interpreted as a criminal statute because anyone who violated its provisions would become subject to criminal penalties.

The House Resolution, taken in combination with the statute under which respondent Rumely was prosecuted for contempt, must be construed like a criminal statute. The House Resolution authorized the committee to conduct an investigation of "all lobbying activities intended to influence, encourage, promote or retard legislation." If "lobbying activities" was intended to cover an infinite variety of activities (including even the publication of books intended to influence public opinion), how could a witness refuse to answer any question, or to produce any document, on the ground that it was not "pertinent" to such an illitimable investigation?

But, under the law (2 U.S.C. 192) if a witness made default, or refused "to answer any question pertinent to the question under inquiry" he would become guilty of a *crime*. How could a witness, even with the aid of legal counsel, determine when his refusal would be justified, or when it would constitute a crime? There could be no "ascertainable standard of guilt" found, in attempting to decide whether a question was pertinent to an inquiry into "lobbying activities," when no one could tell what was meant by "lobbying activities" and what, therefore, a court might eventually decide was pertinent to an inquiry into "lobbying activities."

We submit, therefore, that, if the House Resolution be construed to "encompass the full scope of the Regula-



tion of Lobbying Act," it must be held invalid for the reasons pointed out by the Court of Appeals. The Resolution can only be held valid if it be held to authorize only an inquiry into "lobbying activities" in their "commonly accepted sense." If this necessary limitation is imposed on the authority of the House Committee, then it is clear that the demand upon Rumely was to produce evidence not pertinent to the limited inquiry authorized. Hence, he could not be convicted of a contempt in refusing to respond to this illegal demand.

**B. An Act of Congress Which Compelled Publishers to Disclose the Names and Addresses of Purchasers of Their Books Would Clearly Violate the Freedom of the Press Guaranteed by the First Amendment.**

But, the Government contends that the Resolution did authorize an inquiry into the public sale of books and documents on the ground that the sale of books and documents intended to influence public opinion—and thereby to influence "indirectly" legislation—was a "lobbying activity." In support of this contention the Solicitor General first raises the false issue that payment for books was only a subterfuge for making contributions to a "lobbying" organization. Recognizing, however, that this Court may well hold with the Court of Appeals that this is an attempt to sustain a conviction on "issues not presented in the trial court, and facts not in evidence in the Record," (R. 209) the Government brief ventures upon the argument that the House could authorize an inquiry into the "public sale of books and documents" intended to influence public opinion, as a form of "lobbying" subject to Congressional regulation. Here the Government challenges the soundness of the law long ago

When, however, it became apparent to the government, upon oral argument in the Court of Appeals that the conviction of Rumely could not be sustained on the evidence presented to and considered by the trial court, in view of the improper rulings and instructions of the trial court, then, although the government brief in the Court of Appeals had not raised the question,<sup>3</sup> the government counsel in the oral argument attempted for the first time to make the "subterfuge" contention which was adopted by the dissenting judge and then made the basis for the petition and brief in this Court.

This claim that payments for books were subterfuge contributions is not based on any evidence in the record of this case. Indeed, the Solicitor General is compelled to concede the fact that he is asking this Court to sustain the rulings of the trial judge on the assumption that evidence which was *not* presented and *not* considered by the trial judge *might* have been considered by him and (if not controverted) might have supported his rulings.

The Solicitor General admits that the report of the House Committee was not introduced into evidence, although the dissenting judge in the Court of Appeals mistakenly said it was "made a part of the Record." (R. 214) The dissenting judge also used the transcript of the House Committee hearings to support his views, as does the Solicitor General in his brief. But only a few fragments of that transcript were introduced in the trial record. The dissenting judge said that judicial notice could be taken of Congressional hearings. But, to take judicial notice at a time when there is an opportunity to dispute the accuracy of what is noticed is quite different from an attempt to have an appellate court take judicial notice of testimony in a Congressional hearing to sustain a con-

<sup>3</sup> "No mention of a purpose to probe disguised contributions appears in the Government's brief before us." (R. 200)

viction of a defendant who has had no opportunity to refute the testimony. Furthermore, it is one thing to take judicial notice of facts of common knowledge, but the idea that testimony taken at a Congressional hearing can be incorporated into the Record in the Court of Appeals by "judicial notice", is a novel and extraordinary perversion of "due process of law".

"Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence \* \* \*. It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ohio Bell Tel. Co. v. Comm'n* 301 U.S. 292, 301-2.

Rule 804 American Law Institute Model Code of Evidence and the comments recognize that a court's ruling on a matter of judicial notice will necessarily influence counsel in the further conduct of the trial. See also *United States v. Bryan* 339 U.S. 323 in which both the majority and minority opinion deal with the legal difficulties of even placing the testimony before a House Committee into the record in the type of criminal trial here involved.

The only authority referred to by the government in support of its broad sweeping conclusion that the Court can take judicial notice of committee hearings and reports is *United States v. Aluminum Company of America* 148 F(2) 416 (G.Brief P.49). In that case the Court recognized and followed the fundamental principles of judicial notice which we are urging here when it stated:

"Even though we took 'notice' of these, the report would not be conclusive, or more than evidence. We could not constitutionally substitute it for the findings of a Court after a trial: facts which a Court may judicially 'notice' do not for that reason become indisputable. Wigmore §2567a. At most we could

do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. For these reasons we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies." (P. 446)

But, the excuse for this violation of elementary principles of due process is that the report of the House Committee and the transcript of the House hearings were "actually before the trial judge". (Petitioner's Brief, Page 48) This we flatly deny on the ground that no evidence is "before" a judge unless it is made a part of the record of the case. Government counsel say, "There is nothing to show that it was not considered by the trial judge"; to which we answer, there is nothing to show that it *was* considered. Again, the Solicitor General states, "There is nothing to show that the trial judge did not consider the hearings in passing upon pertinency"; to which we reply first, that there is nothing to show that the trial judge *did* consider the hearings, and, second, that the transcript of the record in the trial court which is part of the record here (R. 14-181) shows plainly that the trial court did *not* consider either the Committee Report or the Committee hearings in making his rulings and, third, that, if he had considered them and had given any consideration to the subterfuge contention made by the government for the first time on the appeal of this case, the trial judge would have been compelled to admit the evidence proffered to show what the activities of C.C.G. and Rumely actually were and what the financial records revealed.

In truth, the trial judge instructed the jury that, "The nature of the activities of the defendant or of the organization with which he was connected is not an issue in this case." (R. 176) If there had been any contention that



payments for books were subterfuges to obtain contributions to carry on "lobbying activities" then, of course, the activities of the defendant would have been a major issue in the case. The ruling of the Court would be nonsensical except on the basis made evident by the judge's earlier commentary which showed that he assumed that the registration (*even under protest*) as a lobbyist was conclusive proof that the House Committee had jurisdiction to compel Rumely to reveal the names and addresses of any purchasers of books, because such evidence, even of a wholly legitimate and candid transaction, would be pertinent to the Committee's inquiry.

That is why we insist that the present, "subterfuge" contention of the government is an attempt to raise a false issue, an attempt to sustain a conviction resulting from rulings which, on the Record before the Court, were hopelessly erroneous. It would make a mockery of the boasted fairness of our administration of justice for this Court to hold that the conviction of a defendant which cannot be sustained on the evidence *on which he was tried*, can be sustained by the consideration in this Court of evidence not presented in the trial court, on one-sided evidence highly prejudicial to the defendant, whose falsity, unfairness and deceitfulness the convicted defendant had no opportunity to expose. He is now helpless to combat this foul play except by the assertions of his counsel that if Rumely had had an opportunity to testify to the activities and the records of his organization, he could have demonstrated thoroughly, first, that they were not engaged in any lobbying activities which the Committee had been authorized to investigate and, second, that, for that reason as well as because of the protection of a free press established by the First Amendment the evidence sought by the Committee was not pertinent to any lawful inquiry by the Committee.



The following quotations from opinions of this Court seem hardly necessary but are submitted to show the absurdity of the government's position.

"After all, pleadings and the making of a proper record have not been dispensed with. We will not review questions not clearly raised on the record." *Standard Oil Company vs. United States* 339 U.S. 157.

"The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record, made up and transmitted as required by law, of what was done in his presence at the trial in open court." *Hopt vs. Utah* 114 U.S. 488.

"Besides judgment can not be reversed upon the mere suggestion that upon some other theory than that upon which the case was tried evidence might have been introduced which might have changed the result." *Thomas vs. Taylor* 224 U.S. 73.

"We can not sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason." *Cramer vs. United States*, 325 U.S. 1.

We submit that the government is seeking to have tried in the Supreme Court a case which was not tried, but which, on the contrary, the government refused to have tried in the trial court. The brief is a confession that the conviction of the respondent cannot possibly be sustained on the issues and evidence actually submitted to the trial jury. This is clearly demonstrated by the opinion of the Circuit Court of Appeals. Thus the government is apparently driven to a contention that the conviction should be sustained because the defendant *might* have been convicted if other issues and other evidence had been submitted to the jury. This contention must be as unique in the annals of this Court as it is affronting to elementary concepts of justice and fair play.

## II The Dominating Real Issues

### The Well Settled Law Regarding Constitutional Limitations on the Legislative Powers of the Congress and the Rights of the Respondent Under the Bill of Rights Require Affirmance of the Action of the Circuit Court.

There were three issues raised by respondent Rumely in justification of his refusal to reveal the names and addresses of purchasers of books published by the C.C.G.

1. Rumely contended that the House by its Resolution had not empowered the Committee to make such inquiries.

2. If the Resolution were construed to authorize such inquiries the House had exceeded its constitutional power by thus attempting to abridge freedom of speech and freedom of the press in violation of the First Amendment.

3. The subpoenas issued by the House Committee were invalid under the Fourth Amendment because they were not founded on any evidence of the materiality of the papers demanded or supported by oath or affirmation, and the information sought and refused was not pertinent to the inquiry and so the demand for its production violated the rights of the defendant under not only the First, but also the Fifth and Ninth Amendments (This third issue was not pressed with the same vigor as the first two issues because the respondent Rumely had voluntarily furnished the Committee or given access to all the records sought, with the exception of records showing the names and addresses of purchasers of books, and he wished to make it clear that he was not opposing an investigation by the Committee even of a dragnet character, but was primarily interested in maintaining the constitu-

tional freedom of the press. The conviction of Rumely on Count 7 of the indictment did not involve the Fourth Amendment, but was based on a refusal to give oral evidence when he appeared as a witness as to the name of "the woman from Toledo", who had paid \$2,000 for distribution of copies of "The Road Ahead", which she purchased for distribution to a specified list of recipients.)

The protections of the Fourth Amendment should be maintained in order to protect the objects of political hostility from being harrassed by "fishing expeditions" into their private affairs, from which they are supposed to be protected by the prohibition in the Fourth Amendment of "unreasonable searches and seizures" and the requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Furthermore, the demand for the information here sought and refused is repugnant to the guaranty of liberty contained in the Fifth Amendment and, not only the guaranties of freedom written into the First Amendment, but also repugnant to the rights retained by the people in the Ninth Amendment, which certainly include rights of privacy, except when the public interest imperatively demands that they be disregarded.

#### **A. Congress Did Not Attempt to Authorize the Buchanan Committee to Investigate Efforts to Influence Public Opinion in Regard to Federal Legislation.**

The House Resolution authorized the Select Committee "to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote or retard legislation." It must be assumed that the phrase "lobbying activities" was not intended to include those manifold activities of book, magazine or newspaper publishers, which are clearly intended to influence, encourage, promote or retard legislation. There must have

been a limitation implied in the very use of the word "lobbying" whereby many activities, intended to influence, encourage, promote or retard legislation, would be excluded.

But, the construction now urged by the government makes the use of the word "lobbying" superfluous and meaningless since apparently any activity to influence legislation is regarded by government counsel as a "lobbying" activity. The opinion of the Court of Appeals makes this point clear (R. 203, 204) and points out the historic reason for describing certain efforts to influence legislation as "lobbying", that is activities carried on in the "lobbies" outside legislative chambers. Of course, personal solicitation of legislators in their homes or offices, or on the streets, would come within the same category of "lobbying". In like manner, making personal appeals to legislators through letters, telegrams, or telephone calls in regard to specific legislation might easily be regarded as a form of "lobbying". In a word, any form of personal approach to a legislator for the purpose of influencing his conduct in regard to a specific piece of legislation might come within the term "lobbying".

However, there would be no doubt that printing editorials in a newspaper regarding specific legislative proposals would be an activity definitely intended to influence legislation. But the Lobbying Act itself specifically eliminated from its coverage not only editorials, news items and other comments, but also "paid advertisements which directly or indirectly urged the passage or defeat of legislation." Surely, if any one had thought it necessary the Act would also have eliminated from "lobbying" the publication of books or magazines advocating or opposing legislation. It could not have been the intent of the Congress to stigmatize as "lobbying activities" the publication of books or magazines strongly urging political



laid down in *Kilbourn v. Thompson*, 103 U.S. 168, and ever since then upheld in the opinions and decisions of this court.

### *The Investigatory Power*

The opinion of the Supreme Court in *McGrain v. Daugherty*, 273 U. S. 135, lays down the major principles of law decisive of the present case. The court held, quoting with approval from *Kilbourn v. Thompson*, 103 U. S. 168, that—

“The principles announced and applied in the case are that neither House of Congress possesses a ‘general power of making inquiry into the private affairs of the citizen’; that the power actually possessed is limited to inquiries relating to matters of which the particular house ‘has jurisdiction’ and in respect of which it rightfully may take other action;” (P. 170)

“While these cases (referring to *Kilbourn v. Thompson*, supra, *In re Chapman*, 166 U. S. 661 and *Marshall v. Gordon*, 243 U. S. 521) are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with ‘general’ power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. The latter proposition has further support in *Harri-  
man v. Interstate Commerce Commission*, 211 U. S. 407, 417-419, and *Federal Trade Commission v.*



*American Tobacco Company*, 264 U. S. 298, 305-306." (P. 173-174)

In answer to a contention that investigative power may be abused, the court further held:

"We must assume, for present purposes that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decision in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the *bounds of the power are exceeded* or the questions are not pertinent to the matter under inquiry." (P. 175-176)

Later in the opinion it was held:

"The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object." (P. 178)

Applying these principles to the present case we submit that if "lobbying activities" were to be the subject matter of legislation they could only be such illegitimate or wrongful attempts to influence legislators as the Congress could constitutionally legislate against. If "lobbying activities" be interpreted to include the legitimate efforts of citizens to influence legislators or legislation by speaking, printing and disseminating economic, social, moral or political opinions so as to influence public opinion—and the opinions of legislators—the Congress would have 'no jurisdiction' to enact laws restricting such constitutionally protected freedoms of speech, press, assembly and petition. The Congress is specifically for-

hidden by the First Amendment to abridge such freedoms and thus violate the fundamental rights of a free people.

In the present case the court must either presume (a) that such invalid legislation was *not* the object of the House in ordering an investigation of lobbying (and hence the records and testimony sought were not pertinent to the inquiry authorized), or (b) that, if such invalid legislation *was* the object of the investigation authorized, then the entire investigation was unlawful and not ordered "to aid it in legislating." Then the investigation would be a deliberately lawless attempt to "inquire into private affairs and compel disclosures" of private opinions and activities beyond the scope of the constitutionally limited legislative power.

It does appear from the sweeping terms and vague coverage of the Lobbying Act that the Congress may have not recognized that it could not legislate to restrict First Amendment freedoms under its power to legislate to restrict illegitimate and wrongful efforts to influence legislators or legislation. The inquiries attempted by the Buchanan Committee certainly show an utter failure to recognize this limitation upon Congressional power. But a court called upon to enforce compulsory disclosure of matters obviously beyond the scope of legislative regulation, must choose between either confining the definition of "lobbying activities" to activities subject to legislative regulation, or else find that the Lobbying Act and the Buchanan Committee investigation were unconstitutional attempts to exercise a power specifically denied to the Congress in the Bill of Rights.

### *The Limitations of the First Amendment*

We should not impose on this court any lengthy dissertation on the rights protected against legislative re-

straint by the First Amendment to the Constitution. But since the government's argument is based upon a desire to plainly violate these rights we are under an obligation to assert them vigorously. A few quotations from opinions of the Supreme Court should be more effective than any original argument.

In *Thomas v. Collins*, 323 U. S. 516, the court held:

"The case confronts us again with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Prince v. Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when

this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge v. Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 *Annals of Congress* 759-760." (P. 529, 530)

In *Lovell v. Griffin*, 303 U. S. 444, the court held that book publishers are included in the freedoms protected by the Constitution when it stated:

"The liberty of the press is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near v. Minnesota*, supra; *Grosjean v. American Press Co.*, supra; *DeJonge v. Oregon*, supra." (P. 452)

As was stated by the court in *Grosjean vs. American Press Co.* 297 U.S. 233, 249:

"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, the opinion of the Court stated principles, as to which we can assume there was and will be no dissent, in holding:

"The right of a State to regulate, for example, a public utility may well include, so far as the due



process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But *freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.*" (P. 639). (Italics ours)

The invalidity of any attempt by the Congress to regulate the publication, distribution and purchase of concededly lawful printed material is so plain that an investigation by a committee "in aid of (such) legislating" cannot possibly be held to be a valid exercise of congressional power.

Justification of the inquiries directed at the respondent and the C. C. G. is attempted by the government on the theory that to require (1) registration by a publisher of any printed material that might "influence directly or indirectly the passage or defeat of any legislation", and to require (2) a public report and accounting for his receipts and expenditures, and (3) a report of the names and addresses of any persons paying him more than \$500, are not "restrictions" upon the freedom of the press.

But such a theory is transparently unsound. The Supreme Court has held:

"The power to impose a license tax on the exercise of these freedoms (protected by the First Amendment) is indeed as potent as the power of censorship which this Court has repeatedly struck down." *Murdock v. Pennsylvania*, 319 U. S. 105

The registration and reporting required in the Lobbying Act—if applied to publishers—is a peculiarly onerous form of licensing. The obviously large cost of compliance is as burdensome as a heavy license tax. The restraints upon publication are not only severe but are actually a form of censorship, prohibiting certain types



of legitimate publication except upon conditions which compel the publisher to register as a "lobbyist" and which deter persons from buying his books because of public criticism that they are supporting "lobbying". The inquiries of the Buchanan Committee were of the character that would undoubtedly injure a publisher's business and scare away his prospective customers. No court can be respectfully asked to ignore these realities. Blind justice may be tolerable but not blind judges. "We may not shut our eyes to any facts of common knowledge". *Louisville Trust Co. v. Louisville N. A. & C. R. Co.*, 174 U. S. 674, 683. "To do this would be to shut our eyes to what all others see and understand". *United States v. Butler*, 297 U. S. 1, 61.

The "lady from Toledo" purchased 4000 copies of *The Road Ahead* to be sent to persons in her home town whose social, economic, moral or political opinions she thought it might influence. Surely she had a constitutional freedom to do this. But, if she had known that her name and address must be reported to Congress and would be sensationally publicized by a committee of Congress she might well have been deterred from making such a purchase.

Even more obvious would be the legislative restraint on large employers to deter them from buying the book published by the C. C. G. entitled *Why the Taft-Hartley Law?* Many an employer, seeking to counteract the notorious propaganda of all major labor organizations against this Act, and to enlighten public opinion as to its merits, would be normally inclined to purchase quantities of these books for distribution. But the enforced publicity of such purchases under the Lobbying Act and the Buchanan Committee investigation would inevitably deter many such employers from thus arousing antagonisms that would surely embarrass their efforts to maintain cordial relations with their employees and union organizations.

As this Court stated in *Thomas v. Collins*, (Supra):

“The restraint is not small when it is considered what was restrained. . . . If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.” (P. 543)

The *Readers Digest*, a magazine of several million circulation, published a condensation of *The Road Ahead*, large quantities of which were sold as a separate pamphlet to many quantity purchasers. Because of the special exemption of newspaper and periodical publishers in the Lobbying Act the *Readers Digest* was not required to register and to report on these sales. Nor could the *Readers Digest* publishers be compelled to give such information to the Buchanan Committee. But the prosecution contends that the C. C. G. was required to register and report *their* sales and to answer the inquiries of the Buchanan Committee regarding these sales and the purchasers.

It would be difficult enough to uphold the validity of this Act of Congress if it arbitrarily required book publishers to register and report as “lobbyists” while it exempted newspapers and magazines from the same requirement, since it is well known that newspapers and magazines are much more actively and continuously engaged in influencing public opinion than book publishers. But the arbitrary burden and restriction upon book publishers becomes positively ludicrous when it is pointed out that the book publisher of *The Road Ahead* is made subject to legislative restraints that are not imposed on the newspaper or magazine publisher of a condensation of the same book!

It is clear that, either the exemption of publishers of newspapers and periodicals was an arbitrary favor

extended to these publishers, which would invalidate any restraints intended to be imposed on book publishers; or the Congress never intended (nor even imagined) that book publishers would be held subject to the law or to investigation by a committee authorized to investigate "lobbying activities".

If, in the alternative, the Congress has acted on the assumption that *all* publishers of any printed material which may "influence directly or indirectly, the passage or defeat of any legislation by the Congress of the United States" can be required to register, report receipts and expenditures, and reveal the names and addresses of purchasers of their publications, then it is imperative that the invalidity of such an excessive exercise of legislative power, in violation of the First Amendment, be speedily made plain by the judiciary. If book publishers can be harassed and muzzled today the entire newspaper and periodical press can be regulated and browbeaten tomorrow on the same theory of legislative power.

It is hard to imagine any method, short of direct censorship and forceful suppression of hostile criticism, by which a national administration could more effectively hamper and embarrass any political opposition to its policies and programs. If "lobbying activities", subject to legislative regulation are held to include any and all publications which may "influence, directly or indirectly" legislation, where is the limit to legislative abridgement of the freedom of the press? Even if criticisms and opposing opinions cannot be directly censored and suppressed, what more effective way could be found to restrain them than to subject critics and opponents to the harassment and burdens of—

1. "registering" as persons engaged in a dubious activity.
2. requiring them to make expensive, detailed reports,

3. dragging them before investigating committees to testify as to their wholly legitimate but essentially private affairs,
4. compelling the disclosure of the opinions and the names and addresses of those who support their activities in order that they in turn may be attacked, harassed and injured by persons who disagree with their ideas and thus may be effectually discouraged from voicing or propagating their opinions?

We see a parallel line of devious reasoning employed today in Czechoslovakia and other communist ruled countries. "Espionage" is universally regarded as properly subject to investigation and punishment by government. So, to abridge freedom of the press, a communist government simply includes the ordinary search of newsmen for news as "espionage" and the publication of news as "subversive attacks" upon the government. By this device even a foreign newspaper reporter, solely engaged in legitimate work, can be tried and convicted of heinous crimes.

The passage of the Lobbying Act and the investigation of the Buchanan Committee follow *exactly the same pattern*. The legitimate publishing and distribution of printed material is stigmatized as "lobbying". Burdensome obligations of reporting, accounting and disclosing private affairs are imposed. Harassing, costly and defamatory investigations are used to injure a legitimate business; and any resistance to improper demands brings a government prosecution and a *jail sentence*.

How absurd for our national officials and the press of our nation to rail at Communist prosecutions—and the imprisonment of an Associated Press reporter in Czechoslovakia—while our own government follows the same pattern of censorship and persecution in using "lobbying" instead of "espionage" as the cloak with which to cover a venomous attack upon freedom of speech and a free press.



Two quotations from a recent opinion of the Supreme Court are most pertinent:

"The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that 'It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' (Mr. Justice Jackson, concurring in *Thomas v. Collins*, 323 U. S. 516, 547 (1945).)" *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 399.

In the above case (which involved the non-communist oath required by the Taft-Hartley Act) the Court answered the contention that the statute was an attempted exercise of "thought control", as follows:

"The answer to the implication that if this statute is upheld 'then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes on all manner of social, economic, moral and political issues', post. p. 438, is that that result does not follow 'while this Court sits' (*Panhandle Oil Co. v. Knox*, 277 U. S. 218, 223 (1928))." (Italics ours) *American Communications Association v. Douds*, supra, P. 410.

We feel confident that "while this Court sits", it will hold that any legislative restraint upon freedom of the press by attempts "to force disclosure of attitudes" (of purchasers or distributors of legitimate publications) "on all manner of social, economic, moral and political



issues", is an invalid abridgement of the freedom of the press protected by the First Amendment.

### *The First, Fifth and Ninth Amendments*

In addition to an abridgement of freedom of the press, which we have discussed at some length, consideration should be given to violation of other constitutional rights which would inevitably follow upon sustaining the construction by the Buchanan Committee of the Lobbying Act and of its own investigatory power, which is offered as the sole legal justification for compelling production of the records and testimony which were refused by defendant.

Free public discussion of public issues by speaking, publishing and distributing opinions as to desirable or undesirable legislation or by assembling and petitioning the government for redress of grievances cannot be constitutionally abridged, hampered and discouraged by defining all efforts to influence the passage or defeat of legislation as "lobbying" and by then forbidding "lobbying" except by persons who register and make a detailed accounting for all receipts and expenditures in aid of "lobbying", so defined, and who report the names of all "contributors". By such legislative action not only freedom of the press is abridged, but also the cognate precious freedom of speech and the right to assemble and petition for redress of grievances.

Effective exercises of freedom of speech, and of the right to assemble and petition, in such a manner as to have any appreciable effect upon public opinion and upon legislation inevitably require, in this nation of 150,000,000 people, the expenditure of money in substantial amounts and the employment of paid agents to do a great deal of detailed, time consuming work. A large mass meeting cannot be arranged, an impressive petition cannot be prepared, halls cannot be rented, adequate

publicity cannot be secured, in support of social, economic, moral or political opinions without organizing for collective action and without collecting and expending considerable sums of money. According to the construction of the Lobbying Act upon which this prosecution is grounded, every such exercise of First Amendment freedoms by volunteer committees, non-profit associations or permanent organizations (such as, for example, the Women's Christian Temperance Union, the American Bar Association or the Federal Council of Churches) would be subject to legislative restraint by compelling compliance with the Lobbying Act and subjecting all persons involved to such investigations as that conducted by the Buchanan Committee.

It is a matter of common knowledge that federal departments and bureaus prepare and distribute at public expense an enormous amount of "educational" material, which is intended to influence directly or indirectly public opinion and legislation.\* Members of Congress themselves have printed and distributed at public expense articles, speeches and reports for the same purposes. To avoid the dangers of such political indoctrination the utmost freedom of private organization and action to educate and influence public opinion is essential to make government "responsive to the will of the people" (*DeJonge v. Oregon*, 299 U. S. 353) and to prevent opposition to the party in power from being overwhelmed by a flood of government propaganda. Hence any attempted legislative restraint on private opinion-making

\* "The Federal Government now employs about 5000 full and part-time press agents, spends an estimated \$65 million a year on salaries and printing. . . . In addition nearly every high Administration official has a press relation adviser who masquerades as a 'special assistant', feeds the press a constant flow of 'don't-quote-me' background information or 'leaks' calculated to prove that 1) the official is wonderful, 2) his opponents are not to be trusted and 3) all is well in Government." *Time*, July 9, 1951, p. 54.

efforts should be regarded as *prima facie* an abuse of legislative power.

● It must be recognized that political campaigns for the election of public officials are subject to certain legislative regulations which have an entirely different justification from that offered for the regulation of "lobbying". The expenditure of money and other contributions to promote the election of a public official may have a direct *and improper* influence upon his conduct in office—as has been unfortunately proven too often in our political history. There may be a reasonable limitation upon the amount of money which should be so contributed or expended. There is an *intended* restraint upon *undue* or *improper* influence, in giving publicity to the names of large contributors. These are not restraints upon freedom of speech or press, but on the use of *improper money influence* upon *individuals*, which might be limited or discouraged by publicity. And here legislative restraint is exercised to remedy a substantive evil and menace to free elections, and representative government, which has been generally recognized as an evil.

But the restraint of expenditures made to propagate opinions on public issues is an entirely different thing. Here the evil to be avoided is not too much, but too little private activity; not the spread but the suppression of private opinion; and not efforts to influence legislation but public inertia and inattention to the discussion of public issues. Here is an area wherein the utmost freedom from governmental restraint is essential to the perpetuation of popular government and the maintenance of individual liberty. This has been recognized and accepted as a foundation principle of our form of government ever since the Constitution and Bill of Rights were adopted. See the unanimous opinion of the court in *DeJonge v. Oregon* (Infra).

This "freedom of political discussion" is protected not only by the First Amendment. It is part of the "liberty"

protected in the Fifth Amendment. It is one of the rights retained by the people in the Ninth Amendment. It is most likely that the invasion of these rights and freedoms will come from the Executive Department. That has occurred all too often. But an executive officer usually acts upon the basis of some authority apparently granted to him by the legislature. The greatest menace of a violation of these rights and freedoms lies always in a legislative Act—the making of a law to restrict the exercise of constitutional liberty. It is most significant that the First Amendment does not read: “No person shall be deprived of”, but reads “*Congress shall make no law*”. The mandate of the people was directed at the legislative authority, explicitly denying to it any power to abridge essential liberties. The people retained in full their right to criticise their government and their public officials, their freedom to express and to propagate their opinions and to call upon their public representatives to respond to these opinions.

The most inexcusable and arrogant defiance of the fundamental sovereignty of “the people” would be for the Congress to interfere in any way with their efforts by every means of legitimate persuasion to induce *their* representatives to act in accordance with *their* opinions. This was surely a right retained in the Ninth Amendment; and the means of its exercise were protected explicitly by the First Amendment.

Personal solicitation may go beyond reasonable bounds and become attempted bribery or coercion. Against such wrongful activities the members of Congress may rightly seek to protect themselves. But they should move most cautiously and with greatest deference to the individual liberties and private rights of citizens when they seek such self-protection. When we observe



the extent to which legislators are openly subjected to inducements of favor by patronage and promotion, and to threats of political reprisal and personal loss and injury, we must realize that any legislative restraint upon exercises of political influence must be very carefully limited to clearly illegal or improper conduct and must avoid very carefully any legislative restraint upon the fundamental freedom of the citizen to express and propagate his political opinions and to influence legitimately the opinions and actions of his representatives.

In the present case, however, instead of a cautious exercise of a dangerous power, the Congress proceeded with legislation and investigation of a most reckless and sweeping character. Only a fearsome regard for the self-protective powers of newspaper and magazine publishers evidently dictated the exclusion of these most influential molders of public opinion from the harassment of the Lobbying Act and the investigations of the Buchanan Committee.

But a majority of the Committee had no regard for the constitutional rights and freedoms of those supporting or carrying on the work of the C. C. G. The defendant and the C. C. G. were denounced as "lobbyists" because they dared to publish books and pamphlets that might create a public opinion in opposition to the legislative program of the party in power. So, by a strictly partisan majority vote, the Committee, over the objections of the minority, proceeded not only to serve and enforce a dragnet subpoena of records, but, after nothing else had been withheld from them, insisted on trying to compel the defendant to reveal the names and addresses of quantity purchasers of books—for what purpose? Simply to embarrass and injure the publisher of books and his customers by smearing them with publicity to create the impression that they were engaging in some sort of dubious activity, derogatorily classed as "lobbying"—a word of evil import.



### C. Reply To Government Argument

The argument of the government is based on the apparent assumption that an era of regulation and terrorization by legislative investigation has arrived and that the doctrines of the Bill of Rights should be scrapped as undue restraints.

What is the answer of the Solicitor General to the foregoing argument?

1. The Government Brief first endeavors to convince the Court that old-fashioned lobbying by "direct button-holing of legislators" has been succeeded by an "organized influencing of public opinion"—(Brief p. 13), by "indirect activities" for the "artificial creation of public opinion." What this "double talk" really means is instead of appealing directly and personally to individual legislators, opponents or advocates of legislation are trying to create a public opinion which will influence legislators to respond to the informed opinions of their enlightened constituents. It means that legislators, who might have a personal or partisan bias in favor of the demands of self-serving blocks of voters (seeking, for example, subsidies or other political favors), may be compelled by an informed electorate to follow a genuine "public opinion" and legislate in behalf of broader public interests.

As the Court of Appeals well held, such a "pressure of public opinion in the Congress" is "not an evil; it is a good, the healthy essence of the democratic process." (R. 203) Of course, as the Court of Appeals noted, "an evil might arise." "But," said the Court, "the case before us concerns the public distribution of books and the formation of public opinion through the process of information and persuasion. There is no evil or danger in that process."

To this judicial wisdom we would add that there is an enormous evil and danger in the abridgement of free speech and freedom of the press. The First Amendment

was enacted to prevent the Congress from imposing on the people the evil and danger of legislation to stifle free speech and to throttle a free press. The great decisions of the Supreme Court protecting the people from that evil and danger are still the law; and we do not believe that the sophistries of the Government argument will persuade this Court to overthrow those barriers to legislative attempts to suppress and control the formulation of an informed public opinion.

2. The Government Brief next asserts the Congressional power to investigate is not subject to Constitutional restraints on the power of Congress to legislate. We submit that the contrary holdings of this Court previously quoted (*supra* p. 28-33, 38) are still the law; and we feel sure they will remain the law. How farcical it would be to hold that, although Congress has been denied any power to enact a law to compel a publisher to disclose the names and addresses of those who buy his books, a mere Committee of either House of Congress, can exercise that power under guise of an "investigation to aid it in legislating."

3. The Government Brief then argues that compelling disclosures of private affairs is not a violation of the constitutional freedom of the press, because this "imposes no *legal* sanctions of any kind on the expression of ideas by anyone." (*Italics theirs.* G. Brief p. 19) But, in the next breath, Government counsel concede this may be "an actual 'restraint,' but it is not an abridgement of First Amendment rights."

In other words it is argued that a "restraint" of free speech or a free press is not an "abridgement" unless there is a legal penalty imposed upon speaking or writing. We submit that that is "double-talk" on a par with the claim that a people are "liberated" when they are subjected to a new form of tyranny. The authors of the First Amendment might well arise from their honored graves to protest against such a distortion of

the guaranties of freedom which they wrote into the Constitution.

4. Finally, the Government Brief argues that if the "restraints" imposed by forced disclosures are *legal* restraints and *would* violate the First Amendment, the House Committee's "*ad hoc* demand for disclosure would be valid"—because the Committee has power (unlimited apparently) to force disclosures in an "investigation" which it could not force by enacting a law. (G. Brief p. 21 and 77) Thus the Solicitor General casually sets aside the long line of opinions stemming from *Kilbourn v. Thompson*, *supra*. In making this argument the government's brief confesses the utter futility of its other arguments by stating that legislation compelling the disclosure of the names sought in the inquiry would probably be void:

"But we also believe that the committee's *ad hoc* demand in the course of inquiry must be upheld even though *general legislation compelling disclosures of the names of CCG's larger purchasers would probably be void or Congress forbidden to compel by continuous inquiry a regular repeated disclosure of names.*" (G. Brief P. 77-78)

Without contra point by point and case by case citations we submit that the entire argument of the Government's Brief is fortified—not by any authoritative precedents—but only by the apparent assumption that a new day of regulation and terrorization by legislative investigations has arrived, and that the old-fashioned language and doctrines of the Bill of Rights should be supplanted by a modernized construction under which Committees of the Congress can (to quote the language of Justice Holmes) "sweep all our traditions into the fire." (*Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 299, 305)

If this Court seeks guidance into this new day it can presumably be found in the "Partial Bibliography" of extra-judicial writings provided in Appendix B of the

Government Brief. We submit, however, that better guidance in the "new order" which was established by the Constitution in 1787 will be found in the landmark opinions of this Court heretofore cited and quoted in this brief in behalf of the respondent.

### III The Minor Real Issues

#### ▼The Conviction Should Have Been Reversed Because of Other Obvious Errors of the Trial Court Which the Court of Appeals Found It Unnecessary to Consider.

Other and independently adequate grounds compelling the reversal of the conviction of the respondent were presented to the Circuit Court of Appeals but were not decided simply because the main constitutional issue provided a sufficient basis for setting aside the verdict. In this connection the Court of Appeals stated:

"Appellant (respondent Rumely) raises other questions respecting the rulings of the trial judge during the course of the trial. We find it unnecessary to consider them." (R. 210)

We also urge that it should be unnecessary for the Supreme Court to pass upon these matters. However, if this Court should disagree so completely with our position and that of the Court of Appeals as to hold that the inquiries directed to respondent Rumely could be constitutionally enforced, then the additional adequate grounds for affirming the Circuit Court's action must be considered.

It is well established that questions apparent on the record are reviewed by this Court where necessary. *Public Service Commission Havemeyer* 296 U.S. 506. Additional grounds apparent in the record will be considered even though rejected by the Court below. *Helvering vs. Lerner Stores Company* 314 U.S. 463. *Langness vs. Green* 282 U.S. 531. *Stelos Company vs. Hosiery Motor-*



*Mend Corp.* 25 U.S. 235. *Story Parchment Company vs. Patterson Parchment Paper Company* 282 U.S. 555.

In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. *S.E.C. vs. Chenery Corp.* 318 U.S. 80; *Helvering v. Gowran* 302 U.S. 238; *Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208; *United States v. American Ry. Express Co.*, 265 U. S. 425; *United States v. Holt State Bank*, 270 U.S. 49, 56.

The additional errors of the Trial Court which are clearly apparent in the record, each of which presents valid grounds for affirming the action of the Court of Appeals, are discussed briefly in this section for consideration if such a review should become necessary.

#### **A. The Record Is Barren of Any Evidence to Support the Trial Court's Rulings in Regard to Pertinency.**

The prosecution in a criminal case has the burden of not only pleading but proving all the essential elements of the crime charged. The government in this case had the burden of proving, as the most essential element of the crime charged, that the information requested was pertinent to the Buchanan Committee inquiry. In the case of *Sinclair v. United States*, 279 U. S. 263, this Court restated this basic rule of law in the following language:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question pertained to some matter under investigation." (P. 296)



In addition it is well established that insufficiency of the evidence requires reversal of a conviction where the case (as here) is one involving deprivation of constitutional safeguards of the accused. — *Cramer vs. United States* (supra).

We have heretofore pointed out that there is no evidence in the present record to support the conclusion of the trial judge that the respondent or the C. C. G. was engaged in any activity that would subject them to any lawful requirements of the Lobbying Act of investigation by the Buchanan Committee. The question may naturally arise as to why the prosecutor did not attempt to prove by some sort of evidence what the activities of respondent and the C. C. G. actually were, and why the prosecutor objected to all evidence offered by the respondent to prove what these activities actually were. This strange reticence suggests only one explanation. The prosecutor must have known that the respondent and the C. C. G. could prove that none of their activities could be subjected to lawful restraint or included within any definition of "lobbying" justifying either regulation or investigation. Any opening of the door by the presentation of any affirmative evidence by the prosecution witnesses would have opened the door to overwhelming negative evidence in behalf of the respondent. So the door was held shut by the prosecutor; and then it was locked by the trial judge against evidence that might have enlightened him as to what the activities of the respondent and the C. C. G. actually were. As a result there is no evidence in the record on which the trial judge could have legally based his rulings.

Even the majority of the Buchanan Committee in its General Interim Report to Congress admits that the nature of the books which were excluded by the trial

judge when offered by respondent are essential to a determination of the question of relevancy.

"The content of the publications concerned is, of course, important in determining whether or not the distributor may lawfully be required to disclose his source of support—either before this committee or pursuant to the Lobbying Act." (81st Congress, 2nd Session, House Report No. 3138, p. 32)

We, as counsel for the respondent cannot incorporate in our brief evidence which was excluded except to the extent of showing that material evidence which was proffered was excluded. Certainly the Government cannot properly incorporate in its brief any alleged evidence that the prosecutor *might* have offered to support a conviction which can not be sustained on the basis of the evidence which was *actually received* and considered. Accordingly we maintain that there was no conflict of evidence weighed and decided by the court (since the only evidence received was the respondent's *denial* of "lobbying activities") and that the crucial conclusion of the trial judge, that, as a matter of law, registration *under protest* for "lobbying activities" was *proof* of "lobbying activities", and his consequent instructions to the jury, failure to grant a judgment of acquittal, and denial of respondent's motion for a new trial constituted indisputable, reversible errors.

An express denial of a fact cannot be taken as an admission or proof of its existence. *Clarendon v. Weston*, 16 Vt. 332. In tax cases a payment under protest is not an admission or proof of liability but, as stated by the court in *Girard Trust Co. v. United States*, 270 U. S. 163, 173: "A protest is for the purpose of inviting attention of the taxing authorities to the illegality of the collection \* \* \*". See also *Fulton Bag & Cotton Mills v. United States*, 57 F. (2) 914.

## B. Fourth Amendment

The protection of the Fourth Amendment of the Constitution against searches and seizures reaches all individuals alike, whether accused of a crime or not. The power given to Congress to investigate matters within the realm of its legislative authority does not carry with it the authority to destroy or impair the fundamental rights that are recognized by the Constitution as inhering in the freedom of the citizen.

This Court in *Interstate Commerce Commission v. Brinson*, 154 U. S. 447, quoted with approval the following statement of Mr. Justice Field *In re Pacific Railway Commission*, 32 Fed. Rep. 241:

“Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.” (P. 479)

The Fourth Amendment protected the respondent from the operation of the subpoenas requesting the names and addresses of the purchasers of books because the subpoenas were not issued upon proper cause, not supported by oath or affirmation, and contained no pretense or claim that the names of purchasers of books were pertinent to the inquiry concerning lobbying activities.

A government's “fishing expedition” into the papers of a private corporation on the possibility that they may disclose evidence of a crime even when instituted under oath is not permitted under the Constitution. As Justice Holmes stated in the unanimous opinion in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 299:

"Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire \* \* \* and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." (p. 305-306)

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. \* \* \* Some ground must be shown for supposing that the documents called for do contain it. \* \* \* A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced." (P. 306)

"The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." (P. 307)

The subpoenas issued by the Buchanan Committee were not induced by any evidence, were not supported by oath or affirmation and did not allege that the information sought as to the names and addresses of the purchasers of books was pertinent to the inquiry. The subpoenas are invalid under the Fourth Amendment for these reasons and also because, as shown in previous sections of this brief, the information sought is, in fact, not pertinent to the inquiry and falls within the prohibitions of the First, Fifth and Ninth Amendments of the Constitution.

The trial court was obviously in error in not entering a judgment of acquittal on the two counts of the indictment based upon respondent's default under these subpoenas.



**C. The Trial Court Erroneously Charged the Jury in Respect to the Meaning of "Wilful" in the Statute Involved.**

The Act upon which the indictment of the respondent was based (set out above in full) declared that every person summoned before either House of Congress to give testimony or to produce papers who "wilfully makes default, or who having appeared refused to answer any question pertinent to the question under inquiry" is guilty of a misdemeanor.

As set forth by this Court in the case of *Murdock v. United States*, 290 U. S. 389

"Two distinct offenses are described in the disjunctive, and in only one of them is wilfulness an element. . . . The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded." (P. 397)

In this same case the Court held the word "wilful", as used in criminal statutes such as the portion of the statute here dealing with default in producing subpoenaed papers, to mean bad purpose or evil motive and stated:

" . . . when used in a criminal statute it (wilfully) generally means an act done with a bad purpose . . . . The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act. . . . It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. . . . The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill-founded as to exhibit bad faith and establish



wilful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose." (P. 394-396).

The respondent Rumely requested the trial court to instruct the jury in regard to "wilful" in the exact language as was requested in the *Murdock* case as follows: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful." (R. 5, 167).

The trial court in this case actually instructed the jury in regard to all three counts that:

"Wilful as used in Title II, Section 192, of the U. S. Code, means deliberate and intentional, and not inadvertent or accidental. Thus the motive of the defendant in failing to comply with the subpoena, and his reason for such failure, or his reason for refusing to answer any question, are not material so long as you find that he did so intentionally and deliberately. The word 'wilful' does not mean that the failure or refusal to comply with the committee's order or refusal to answer a question must necessarily have been for an evil or a bad purpose. The reason or purpose of the failure to comply or refusal to comply is immaterial, whether it is done in good faith or bad faith, so long as the refusal is deliberate and intentional and is not a mere advertence or an accident.

"Even if a person believes that he has a legal right to refuse to produce documents, or to refuse to answer questions, if that belief is erroneous this circumstance would be immaterial, for one decides at his own peril what his legal duties are.

"You are further instructed that the fact that the defendant may have acted pursuant to advice of his

attorney, or others, would not be justification for his refusal to comply with the subpoenas or his refusal to answer." (R. 177)

The ~~finding~~ of the trial court that the reasons for appellant's refusal to produce the documents requested were immaterial and the trial court's instructions to the jury on wilfulness are clearly reversible error under the express rulings of this Court in *Murdoch v. United States*, (supra) the principles<sup>5</sup> of which were reaffirmed and followed in *Morissette v. United States*, 342 U.S. 246. See also *Townsend v. United States*, 95 F(2) 352, Cert. Denied 303 U.S. 664. This is particularly true in view of the fact that the appellant did not "wilfully," but, in good faith and upon the opinion and advice of competent counsel, refused to give the names of the book purchasers demanded, as he told the committee only because he was convinced that it would be a violation of the Bill of Rights and of his constitutional rights as a publisher.

### CONCLUSION

This case originated in a serious abuse of legislative power, in an inquisition prosecuted by a House Committee in arrogant violation of the constitutional limitations upon legislative power.

This case proceeded through a travesty upon a fair trial, in which elementary rights of a defendant to introduce evidence in his behalf were disregarded, and incompetent and insufficient evidence introduced by the government was given unworthy weight. All vital issues were held to be, and decided by the judge as, issues of law; even the issue of wilfulness, that is of a criminal

<sup>5</sup> "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *Morissette vs. United States*, 342 U.S. 246. P. 274.

intent, was decided *for* the jury *by* the trial judge, who would not permit the jury to hear any evidence of the good faith with which a citizen was willing to risk his liberty in order to maintain his constitutional rights. Under the instructions of the trial judge, based on improper rulings of evidence and disregard for the constitutional decisions of the Supreme Court, the jury was left no choice except to return a verdict of guilty.

This case reaches its final conclusion in an appeal by Government lawyers to the highest judicial tribunal in the land to disregard, not only constitutional limitations upon legislative power, but also long-established and constitutional limitations upon judicial power. An appeal is made to this Court to sustain a criminal conviction on the basis of alleged evidence which was never received by the trial court, on the basis of evidence which, if received, would have been refuted.

In short, this Court is asked to disregard the fundamental principles of due process of law and to sustain a criminal conviction on the basis of charges made against the defendant for the first time in this Court—charges as to which no evidence was heard in the trial court, charges based on the assertions of the Solicitor General, supported by the equally unreliable assertions of a partisan majority of a legislative committee.

This is plainly an effort to sustain a criminal conviction without giving the convicted man any notice or opportunity to be heard upon the charges made—without any hearing on these charges by the jury which is supposed to have convicted him. This extraordinary method of presenting this case in this Court has carried the impact of the anticipated decision beyond even the question as to whether the First Amendment is to be de-

fended and supported as a constitutional limitation upon *legislative* power. The decision of this case will also determine whether the mandate of the Fifth Amendment, that no person shall be deprived of liberty without due process of law, is to be defended and supported as a constitutional limitation upon *judicial* power.

There is only one explanation of the ruthless prosecution of this case against the respondent Rumely, beginning with a partisan political inquisition in a House Committee and proceeding through a politically biased trial in the District Court to its fitting conclusion in a politically biased appeal to this Court. That explanation is the ever growing intolerance of criticism, characteristic of those entrenched in political power and their ever growing desire to suppress the opposition of citizens who exercise the essential liberties of a free people—those freedoms of speech and of the press which are guaranteed by our Constitution to protect our people against the oppressions of Government.

There is no lesser issue in this case; there can be no greater issue submitted to this Court than: The destruction or preservation of those freedoms upon which depends not only the majesty of this Court, but the very life of the Government and of the Constitution which this Court is sworn to defend.

In *DeJonge v. Oregon*, 299 U.S. 353, the unanimous opinion of this Court by Chief Justice Hughes pointed out the "imperative need"—"to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." And, he

concluded—as we do: “Therein lies the security of the Republic, the very foundation of constitutional government.”

Respectfully submitted,

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**APPENDIX**

*Opinion of United States District Court for the District of  
Columbia in National Association of Manufacturers  
vs. J. Howard McGrath, March 17, 1952.*

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103 F. Sup. 510.

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(Appeal Dismissed Supreme Court No. 174, October 13,  
1952

Rehearing Denied November 18, 1952)

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Before Wilbur K. Miller, Circuit Judge; Henry A.  
Schweinhaut and Alexander Holtzoff, District Judges.

Holtzoff, District Judge: This action is brought by the National Association of Manufacturers of the United States and one of its officers against the Attorney General of the United States, to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act (Act of August 2, 1946, secs. 302-311, 60 Stat. 839; 2 U.S.C.A. secs. 261-270). The basis of the action is twofold: first, that the Act is unconstitutional; and, second, that even if valid, it is not applicable to the plaintiffs.

The Act may be divided into two parts: First, all persons, except political committees, who directly or indirectly solicit, collect, or receive money to be used prin-

cipally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress of the United States; or to influence, directly or indirectly, the passage or defeat of legislation by the Congress of the United States, are required to keep a detailed and exact account of contributions and expenditures with receipted bills, and to file with the Clerk of the House of Representatives quarterly statements listing contributions and expenditures (Secs. 303-307).

The second part of the Act requires persons who engage for pay, or for any consideration, to attempt to influence the passage or defeat of legislation by the Congress of the United States, to register with the Clerk of the House of Representatives and with the Secretary of the Senate, and to file certain quarterly reports (Sec. 308). These two parts of the Act are severable. The second is not involved in this action.

It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions.<sup>1</sup> Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity. For this reason, the Court will not consider the contention that on the factual situation presented by the evidence, consisting of lengthy depositions and voluminous exhibits, the plaintiff Association is not subject to the terms of the statute. This is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted.

On the other hand, an exception to the general principle is at times made if it is contended that the statute is unconstitutional and the consequences of a violation

<sup>1</sup> *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95. *Cave v. Rudolph*, 53 App. D. C. 12, 15.

may be unusually serious, possibly resulting in irreparable damage.<sup>2</sup> For example, in this case if the statute is valid and the Association erroneously determines that it is not subject to its provisions, it may be liable to a penalty, not only of a fine, but of a proscription for a period of three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation by the Congress. The Court is of the opinion that this case is within the exception insofar as concerns the contention that the pertinent provisions of the statute are unconstitutional. Accordingly the Court will in this action pass upon the validity of these provisions.

The Government has raised the question whether the plaintiffs are in a position to maintain this action on the ground that no prosecution has, as yet, been threatened. A great deal of testimony has been taken on this issue. The Court finds that such a prosecution has, in fact, been threatened, even though the threat has not been made formally.

The vital provision of the pertinent portions of the statute (Sec. 307) makes its requirements applicable to any person who, by himself or through any agent or employee, or other persons, in any manner whatsoever, directly or indirectly, solicits, collects, or receives money to be used principally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress, or to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of

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<sup>2</sup> *Dobbins v. Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 163 *et seq.*; *Truax v. Raich*, 239 U. S. 33, 37-39; *Adams v. Tanner*, 244 U. S. 590; *Terrace v. Thompson*, 263 U. S. 197, 214; *Packard v. Banton*, 264 U. S. 140, 143; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 451-2; *Parker v. Brown*, 317 U. S. 341, 349-350; *Hynes v. Grimes Parking Co.*, 337 U. S. 86, 98-100.

the United States. It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action, or failure to act, is prohibited. A criminal statute which does not comply with this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle in our constitutional system, since without it, it would be possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden.

For example, in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, the Court passed upon the validity of a Kentucky statute, which made certain combinations for the purpose of controlling prices lawful, unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The Court held that the statute offered no standard of conduct and was, therefore, invalid.

In *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89, the Court held unconstitutional an Act of Congress, which made it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities. This result was reached on the ground that no definite standard of conduct was prescribed by the statute.

In *Connally v. General Const. Co.*, 269 U. S. 385, 391, the Court considered an Oklahoma statute, which provided that all persons employed by or on behalf of the State shall be paid not less than the current rate of per diem wages in the locality where the work is performed. It was held that this statute was repugnant to the due process clause of the Fourteenth Amendment on the ground that the phrase "current rate of wages" and the

word "locality" were indefinite and ambiguous. The Court summarized the pertinent principles as follows:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Cline v. Frink Dairy Co.*, 274 U. S. 445, 456, the Court struck down a State statute, which declared all combinations to be against public policy, unlawful and void, except those whose object and purpose was to conduct operations at a reasonable profit or to market at a reasonable profit those products which otherwise could not be so marketed. The Court reached the conclusion that this statute involved so many factors of varying effect that one could not decide in advance whether any proposed action on his part would violate it.

In *Champlin Refg. Co. v. Commission*, 286 U. S. 210, 242, the Court held invalid a statute, which prohibited production of crude oil in such manner and under such conditions as to constitute waste. The Court referred to the fact that the general expressions employed were not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty.

In *Lanzetta v. New Jersey*, 306 U. S. 451, the Court had before it a New Jersey statute to the effect that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more per-



sons, is declared to be a gangster. The Court held that the words "gang" and "gangster", and the phrase, "known to be a member", were ambiguous and so vague, indefinite, and uncertain as to render the statute repugnant to the due process clause of the Fourteenth Amendment.

In *Winters v. New York*, 333 U. S. 507, a New York statute which punished any one who published, sold, distributed or showed, or had in his possession, with intent to sell, distribute or show, any printed paper principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime, was deemed not to meet the required standards and not to contain ascertainable standards of guilt. The Court concluded that the statute was violative of the due process clause of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia in *United States v. Capital Traction Co.*, 34 App. D. C. 592, passed upon a statute imposing penalties on any street railway company in the District of Columbia, that failed to supply and operate a sufficient number of cars, to all persons desirous of the use of said cars, "without crowding said cars". The Court held that the statute was unconstitutional, as the phrase "without crowding" was too uncertain and indefinite to constitute an ascertainable standard of guilt. It pointed out that the dividing line between what is lawful and unlawful may not be left to conjecture.

Applying the foregoing doctrine to the instant case, the conclusion is inescapable that Sections 303 to 307 are invalid. The clause, "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indi-

rectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.

What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.

We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than \$5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the

passage or defeat of any proposed legislation, or from appearing before a Committee of Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of \$10,000.

Freedom of speech and the right of the people peaceably to assemble and to petition the Government for redress of grievances are guaranteed by the First Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307, inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

Accordingly, we hold that Sections 303 to 307, inclusive, of the Act are unconstitutional. We regard Section 308 as severable and we, therefore, do not express any opinion as to its validity, because that question is not involved in this litigation.

A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted.